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FUR SEAL ARBITRATION.

PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 20, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOVERNMENTS CONCERNING THE JURISDICTIONAL RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME X.

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1895.

BEHRING SEA ARBITRATION.

ARGUMENT

OF

HER MAJESTY'S GOVERNMENT.

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ARGUMENT OF HER MAJESTY'S GOVERNMENT.

PREFACE.

In August 1886, without any previous protest or warning, the Government of the United States seized the British schooners "Carolena," "Onward," and "Thornton" in Behring Sea, which were then engaged in pelagic sealing there.

The "Carolena" was seized in latitude 55° 50′ north, longitude 168° 53′ west; the "Onward" in latitude 54° 52′ north, longitude 167° 55′ west, and the "Thornton" in about the same latitude and longitude as the "Carolena." These schooners were, at the time of their respective seizures, at a distance of more than 60 miles from the nearest land, St. George and Unalaska Islands. After capture they were taken by the United States revenue-cutter "Corwin" to Unalaska. They were tried before Judge Dawson, of the United States District Court of Sitka, and the masters and mates of the vessels were fined in a considerable sum, and, in addition, sentenced to a term of imprisonment. The vessels, meanwhile, were detained.

On receipt of intelligence of these seizures, Sir L. S. Sackville West, British Minister at Washington, at once made inquiries; and by the instructions of Her Majesty's Government, on the 21st October, 1886, he entered a formal protest against these seizures of British vessels.

Mr. Bayard, the Secretary of State, wrote, on the 3rd February, 1887, to Sir L. S. Sackville West, announcing the discharge of the vessels, and the release of all persons under arrest, adding that this order was issued "without conclusion of any questions which may be found to be involved in these cases of seizure."

2 The men in custody were released under circumstances of great hardship, being turned adrift, without means, in a place many hundreds of miles from their homes.

On the 12th April, 1887, Mr. Bayard wrote that Regulations and Instructions to Government vessels were being framed, and that he would, at the earliest possible date, communicate with Sir L. West; but without any such communication being made fresh seizures took place in July and August of 1887, and renewed protest was made by Great Britain.

No seizure was effected in 1888, though pelagic sealing by British vessels was pursued in that year in Behring Sea.

In 1889 five British ships were seized in Behring Sea, and three others were peremptorily ordered out of the Sea.

In 1890 no seizures were made, though pelagic sealing was still carried on in Behring Sea.

The Government of the Queen remonstrated against the high-handed action of the United States as without warrant of law, and as an unjustifiable invasion of the rights of British subjects. But the correspondence has been carried on by them with an earnest desire to avoid recourse to measures of force in retaliation for those adopted by the United States, and in the confident belief that their rights would be surely and effectively vindicated by pacific methods, and just redress obtained for the wrongs committed.

As the result of prolonged negotiation and discussion the Treaty of Arbitration, from which this Tribunal derives its authority, was entered into, and on the 18th April, 1892, the Convention or *modus vivendi* (intended to cover the period which might elapse before the award of the Arbitrators) was concluded.

Hence it is that now, and for the seventh time in the course of the present century, the Governments of Great Britain and of the United States appear before an International Tribunal of Arbitration. To-day they submit existing differences to a distinguished body of jurists, with the full confidence that, in so far as the adjustment of those differences depends upon the ascertainment of legal rights, this august Tribunal will act upon recognized principles of law, and upon such principles alone; and with equal confidence that, in so far as that adjustment may properly have
3 regard to other than legal rights, the decision of this Tribunal will be just and equitable, having regard to all the circumstances of the case, and to all the important interests involved. This Tribunal will seek neither to diminish nor to add to the powers with which it is invested, and it cannot be doubted that each of the Governments will loyally accept its authoritative judgment.

Before proceeding with the Argument, which is now presented in accordance with the procedure prescribed by the Treaty, and which recapitulates the facts and discusses in some detail the principles applicable to them, the Government of the Queen deem it expedient to put before the Arbitrators a general view of the claims advanced by the United States, and of the contentions which arise in relation to them.

Those claims are divisible into two heads. Under the first head the United States claim, in various modes, exclusive rights in and over the greater extent of that part of the Pacific Ocean called Behring Sea, and in the fur-seals frequenting that sea, rights which they contend justify them in excluding the ships of every other nation from the pursuit of pelagic sealing therein, and in searching, seizing, and condemning such ships as engage in that pursuit.

This is, indeed, hardly a full statement of the pretensions

advanced, for, carried to their logical conclusions, some of the arguments of the United States would equally justify them in treating that vast expanse of water as a *mare clausum* to all the world: so that the navigation of those waters by the nations of the world would be dependent solely on the moderate exercise by the United States of rights which they claim to possess, but upon which they do not insist.

Under the second head the United States claim that, by the authority of this International Tribunal, concurrent rules shall be established for the proper protection and preservation of fur-seals in or habitually resorting to Behring Sea.

It will be seen how essentially these two divisions of claim differ one from the other.

Under the first division the United States invoke the high authority of this Tribunal to affirm in them the existence of dominion and jurisdiction which conflict with long-established principles touching the rights of nations and the freedom of the seas.

4 The Government of the Queen deny the existence of any such dominion and jurisdiction, and to their assertion have offered and continue to offer strenuous opposition.

But, on the other hand, when the rights asserted are distinctly abandoned or are negatived, and when it is admitted that the concurrence of Great Britain is required to any Regulations, the Government of the Queen will willingly join with the United States in seeking the aid of this impartial Tribunal in the consideration of Rules which shall recognize that the protection and preservation of fur-seals is not a matter affecting the interests of the United States alone, and which shall be just and expedient in view of all the circumstances of the case, and having regard to all interests which are concerned.

How, then, is the case put as one of right?

Seldom, if ever, has such a claim been based upon such varying contentions.

Seldom have the arguments supporting a claim of right been shifted so lightly from one standpoint to another.

Now it is asserted as a claim of old descent from Russia; then, when it is shown that Russia neither had nor claimed to have a right at all commensurate, it becomes a claim by the United States in their own right of dominion.

At one time it is a claim to a vast area of Behring Sea as territorial waters; but, when the limits of territorial waters assented to by all nations are insisted on, it becomes reduced to a claim of jurisdiction on the high sea—a claim based upon a false analogy.

Fur-seals are undeniably animals *ferœ naturæ*, yet a claim to property therein, with all its attendant rights, is asserted, and they are gravely relegated to the same category as a herd of cattle on the plains. Then, when the impossibility of establishing property in free-swimming animals in the ocean is demonstrated, the pretension resolves itself into a general and undefined claim to protect the seals in the Pacific.

Finally, a vague appeal is made to the principles of the common and the civil law, to the practice of nations, the laws of natural history, and the common interests of mankind; but one looks in vain for any vindication of the unprecedented pretensions put forward upon any such principles.

Yet the issues are clear:

Was the Government of the United States legally justified in seizing British vessels engaged in pelagic sealing in Behring Sea outside territorial waters?

Did the sailors on board those vessels, who owed no allegiance but to their Queen, violate any right of the United States or of its citizens in such pelagic sealing?

The historical and jurisdictional aspects of the matter have been discussed at length in the British Case and Counter-Case. In the United States Counter-Case it is stated that the questions involved in them are of secondary and very limited importance.

But the historical and jurisdictional considerations have a bearing upon the case, the importance of which cannot be thus lightly dismissed.

The United States, in extending their laws over the eastern part of Behring Sea, have made a distinct claim to include that part of the Pacific within their territorial dominions, and also to protect the seals in Behring Sea, as if the prelagic industry were carried on within their dominions. Judges in the Courts of the United States have declared this to be the true meaning of the Statutes they were called upon to interpret and to enforce against the British vessels.

The United States cannot substantiate their claim in virtue simply of their possession of the Territory of Alaska. They must rest it on the Treaty of Cession. The effect of that cession depends upon two points:

1. What did it profess to cede?

2. What had Russia the title to cede, for Russia could not assign what she did not possess?

In this connection the Treaties of 1824, 1825, and 1867 are important, since their text and history show that Russia never made claim to such rights as are now alleged; that she made a claim of a different nature, and made that claim only immediately to abandon it; and, lastly, that Russia did not even pretend to cede the rights now asserted.

Yet the Sections of the Revised Statutes relating to Alaska under which the British vessels have been condemned, as interpreted by the Courts of the United States, are based on dominion and on the doctrine of *mare clausum*. And by this interpretation, not the prohibition against sealing alone, but all "the laws of the United States relating to customs, commerce, and navigation," have been extended over the whole of the eastern part of Behring Sea. If this interpretation were sound and warranted by the Treaty of Cession, the answer is complete; the law of nations does not recognize such an extension of municipal law against foreigners; and the law, in so far as it applies to foreigners, is *ultra vires*. But if this interpre-

United States Case, Appendix, vol. 1, p. 92 *et seq.*

tation is not correct, then these Sections do not extend beyond the territories, islands, and territorial waters of Alaska Territory, and the decisions of the Courts have no warrant even in the legislation of the United States.

Considerations such as these, sapping as they do the very foundations of the claim of the United States, cannot be treated as other than most material to the due determination of the questions submitted to the Arbitrators.

Nor is it of less importance to recapitulate with some insistence and circumstance of argument the fundamental principles on which the freedom of the sea reposes.

Can it be denied that the claim of the United States, with or without its pretensions of descent from Russia, finds no warrant in these fundamental principles? If denial were possible, it would have been unnecessary to dive into the Statutes of other nations for analogy. Yet never was the argument from analogy put to such strange uses. Principles of construction have been applied to foreign laws which the Judges, in whose hands the construction of those laws rests, would never recognize. And on foundations so loosely put together conclusions have been based at variance with the fundamental principles of legislation and interpretation.

Shorn of all support of international law, and of justification from the usage of nations, the claim of the United States to possess and to protect the seals in the high sea takes, at last, its final form—as claim of property.

Yet not wholly is it rested on property. The greatest jurists of the world have dealt with "property" and "possession" in such fashion, have defined their meanings with such precision of thought and language, that it is not surprising the United States should shrink from the hopeless task of attempting to formulate a new species of ownership. And so, at last, driven from all the standpoints of admitted and long-known rights, the argument of the United
7 States takes refuge in a claim for protection where there is no property, under circumstances so novel that its supporters confess with candour that it can be rested on no precedent, but that a precedent ought to be established by international law to meet the exigencies of the case.

To all this shadowy claim the Government of the Queen submit but one answer—the Law.

It is sought to support this strange right by reason of the industry of the United States citizens, and the benefit which that industry is said to confer on the markets of the world. But the rights of industry and the benefits of others interested therein are already cared for by the law.

It is said that the United States has a right to the seals as to the products of the soil. The law already sufficiently protects the products of the soil.

Animals are not products of the soil. The birds building in the trees, the rabbits burrowing in the ground, are but wild animals to the law. Yet in respect of them the law has already defined the extent of the rights of property, and has protected these rights.

Again, the claim is to the increase of the seal as to the sheep-farmer is given the increase of his flock. The law deals with the increase of the flock; and the increase of wild animals it deals with too.

"An industry the property of the nation on whose shores it is carried on"—such is the form in which the United States claim is presented by one of its ablest advocates, a form which evades the most elementary questions as to the foundation, the nature, and the extent of the rights so claimed.

The whole case, and every part of it, and every form in which ingenuity can frame it, are covered by the law. And to this law Her Majesty's Government most confidently appeal.

And there is another law to which that Government appeal with equal confidence—the law on which depends the freedom of the sea.

What is the freedom of the sea?

The right to come and go upon the high sea without let or hindrance, and to take therefrom at will and pleasure the produce of the sea. It is the right which the United States and Great Britain endeavoured, and endeavoured successfully, to maintain against the claim of Russia seventy years ago. It is the right in defence of which, against excessive claims of other nations, the arguments of the United States have in former times held so prominent a place.

And what is this claim to protect the seal in the high sea? It is, as of right and for all time, to let and hinder the vessels of all nations in their pursuit of seals upon the high sea; to forbid them entrance to those vast seas which the United States have included in the denomination of the "waters of Alaska;" to take from these vessels the seals they have lawfully obtained; and to search, seize, and condemn the vessels and the crews, or with show of force to send them back to the ports from which they set out.

And so, according to the contention of the United States, "protection of an industry" at sea justifies those acts of high authority which by the law of nations are allowed only to belligerents, or against pirates with whom no nation is at peace.

From giving its high sanction to these views this Tribunal may well shrink; and it is with no mere idle use of high-sounding phrase that Great Britain once more appears to vindicate the freedom of the sea.

This, then, Her Majesty's Government submit is the issue raised by the dispute, an issue which they leave with confidence in the hands of this Tribunal. Were the British vessels right or wrong? If the United States Congress could by the law of nations legitimately pass this Statute to bind foreign vessels upon the high seas, they were wrong in refusing to obey; but if Congress could not legitimately bind foreign vessels, their seizure was unjustifiable, and their owners must be compensated.

But there is another aspect of the question to which (the legal questions having been decided in favour of Great

Britain) the attention of the Arbitrators must be called before their labours are complete: the question whether any, and, if so, what Sealing Regulations it may be necessary to formulate.

The position which Her Majesty's Government have consistently maintained on the subject of these Regulations is clearly set forth in the Introduction to the Second Part of the Counter-Case presented on its behalf. It suffices
9 now, in the briefest manner possible, to insist on that position.

So long as the claim of the United States to impose Regulations on pelagic sealing is based on the assertion of a legal right, that claim is strenuously opposed, and the right as strenuously denied.

But when the question is put on the lower and practical plane of common benefit to all the nations interested, on the recognition of the right of the pelagic sealer as well as of that of the island sealer, then the British Government will cordially co-operate in giving effect to such measures as may be found necessary for the preservation of the fur-seals.

On this basis the question assumes the negation of the right which the United States now claim, and admits the necessity for the concurrence of Great Britain. Her Majesty is, and always has been, ready to concur in Regulations just and equitable in the interests of all concerned; but she has been unable to join in the consideration of Regulations based on the principle that the United States have a legal right to the protection which those Regulations are intended to give.

Should any regulations be the outcome of this Arbitration, it is confidently expected by Her Majesty's Government that they will be such as not to protect only the United States in the manner which their present contention urges, but to protect an industry in which all the nations of the world have an interest.

It were useless to make Regulations which should bind only citizens and subjects of the United States and Great Britain. As in the case of the Jan Mayen fisheries, so in the case of the Pacific fisheries, the subjects of all the nations who now participate in them, or who may be reasonably expected to do so, ought to be equally bound.

Her Majesty's Government cannot leave this subject without expressing regret and disappointment at the position apparently assumed by the United States on the question of Regulations. It is discussed by the United States as if the exclusion of all the other nations of the world from a share in the fur-seal industry in the western seas were to be the aim and purpose of such Regulations. Her
10 Majesty's Government absolutely dissent from this view, and feel confident this Tribunal will not approve it. If the existing rights of nations are to be abridged, they can justly be abridged only in the interests of all, and the United States of America must be prepared to do their part by the adoption of Regulations and improved methods on the islands to preserve the fur-seals.

Finally, the broad contentions of the respective Governments, stated in popular language, are these:

1. The United States claim dominion, and the right to legislate against foreigners, in two-thirds of that part of the waters of the Pacific Ocean called Behring Sea.

2. They claim a right of property in wild animals which resort for a certain season of the year only to their territory, derive no sustenance therefrom, and, during the greater part of the year, live many hundreds of miles away from that territory in the ocean.

3. They claim the right to protect that alleged right of property by search, seizure, and condemnation of the ships of other nations.

4. Failing the establishment of the right of property, they claim a right to protect the fur-seals in the ocean, and to apply, in assertion of that right, the like sanctions of search, seizure, and condemnation.

5. And lastly, failing these assertions of right, they claim that Rules shall be framed in the interests of the United States alone which shall exclude other nations from the pursuit of fur-seals.

On the other hand, Her Majesty's Government claim—

1. Freedom of the seas for the benefit of all the world.

2. That rights of property, and rights in relation to property, be confined within the limits consecrated by practice, and founded on general expediency in the interests of mankind.

3. That, apart from agreement, no nation has the right to seize the vessels of another nation on the high seas in time of peace for offences against property excepting piracy.

4. That any Regulations to be established should have just and equitable regard to all interests affected.

In support of the views of Her Majesty's Govern-
11 ment thus generally stated, the following Argument is respectfully submitted for the consideration of this Tribunal of Arbitration.

STATEMENT OF QUESTIONS RAISED IN ARTICLE VI OF THE ARBITRATION TREATY.

Article VI. (1.) What exclusive jurisdiction in Behring Sea, and what exclusive rights in the sea fisheries therein, did Russia assert and exercise prior and up to 1867?

(2.) How far did Great Britain recognize and concede "these claims of jurisdiction as to the seal fisheries"?

(3.) Was Behring Sea included in "Pacific Ocean" in the Treaty of 1825?

What rights, if any, in Behring Sea did Russia hold and exclusively exercise after this Treaty?

(4.) Did not all Russia's right: (*a*) to jurisdiction, (*b*) as to the seal fisheries in Behring Sea, east of the water boundary, pass to the United States unimpaired under the Treaty of 1867?

(5.) Has the United States any, and, if so, what, right (*a*) of protection (*b*) or property in the seals frequenting the islands of the United States in Behring Sea when they are found outside the ordinary 3-mile limit?

The points raised by these questions are met by Great Britain in this written argument by establishing the following principal propositions:

PROPOSITIONS MAINTAINED IN PART I OF THE ARGUMENT OF GREAT BRITAIN.

1. That the size and geographical conditions of Behring Sea are such that no nation has a right to close the sea against the navigation of the ships of other nations; nor to claim or assert territorial dominion over the sea; nor to claim or assert the right of jurisdiction, nor to exercise jurisdiction, over the sea beyond the 3 miles of territorial waters, as recognized by international law.

2. That Behring Sea is the high sea, and forms part of the Pacific Ocean; and that no nation has a right to claim, assert, or exercise jurisdiction on the sea in any other cases than those recognized by international law.

3. That, in 1821 only, and at no other time, Russia
12 asserted a *jurisdiction* over so much of Behring Sea as was included in a belt of 100 Italian miles from the shores of her territories:

That she never exercised such jurisdiction, but, on the protest of the United States and Great Britain, immediately withdrew her assertion of it, and limited her claim to the 3 miles of territorial waters recognized by international law:

That Russia did not at any time assert or exercise *jurisdiction* over the whole of Behring Sea, nor claim to close that sea, nor did she at any time assert or exercise the rights of *territorial dominion* over any part of such sea.

4. That the withdrawal of the claim to 100-mile jurisdiction was confirmed by both the Treaties which Russia entered into (1) with the United States in 1824, and (2) with Great Britain in 1825.

5. That the United States acquired from Russia, under the Treaty of 1867, no rights beyond the sovereignty of the ceded territories (which did not include any part of Behring Sea) and the right of jurisdiction over the 3 miles of territorial waters as recognized by international law; and that the United States have no right, in virtue of their possessions on the shores and the islands of Behring Sea, to any dominion over that sea, or to any jurisdiction in its waters, other than that recognized by international law in the 3 miles of territorial waters.

6. That it was beyond the right of the United States to make laws under which British vessels could be condemned by the United States Courts, or under which the United States cruizers could interfere with British vessels engaged in pelagic sealing in Behring Sea, and that such laws were legitimately disregarded by British subjects.

VARYING CHARACTER OF UNITED STATES CONTENTION.

In view of the great complexity and varying nature of the United States contention, the following brief survey of the manner in which their case has been presented is submitted.

This is the more essential, as the United States diplomatic correspondence, and other documents in which the United States claim is advocated, do not keep the points clear, but move imperceptibly from one standpoint to another.

13 The points to which the argument of the United States is directed are these:

1. That Russia claimed and exercised the jurisdiction in Behring Sea now asserted, and ceded it to the United States, and that, therefore, the United States are entitled to exercise it in virtue of the Treaty of Cession of 1867.

2. That the United States have the like jurisdiction over Behring Sea in virtue of their own possessions, and in their own right of dominion.

3. That the United States have jurisdiction over the eastern portion of Behring Sea as part of their territorial waters.

4. That the United States have jurisdiction for the protection of the fur-seal in virtue of an alleged right of nations to exercise similar jurisdiction on the high sea, apart from any dominion or special jurisdiction over Behring Sea.

5. That the United States have a property in the seals on account of their breeding and temporary residence on the Pribyloffs, and a right to follow such seals and protect them in the high sea, apart from any dominion or special jurisdiction.

6. That the United States have such right of protection apart from any right of property.

Of these six claims, it is submitted that the last three, so far as they assert a jurisdiction extending beyond Behring Sea, or the eastern portion thereof, are not included in the reference to this Tribunal made by the Treaty of Arbitration.

DIVISION OF ARGUMENT.

The following Argument is thus divided:

In Part I the grounds are set forth on which Great Britain claims that all the questions arising under the first four questions propounded in the VIth Article of the Treaty of Arbitration should be decided in favour of Great Britain.

In Part II the United States claim of right of protection or property in fur-seals is considered, and the grounds are set forth on which Great Britain claims that the fifth question propounded should be decided in her favour.

14 In Part III the question of regulations is discussed; and

In Part IV the claims of Great Britain and of the United States respectively for damages are considered.

ARGUMENT.—PART I.

Argument addressed to the first four Questions for Decision under Article VI of the Treaty of Arbitration.

NATURE, EXTENT, AND GEOGRAPHICAL POSITION OF BEHRING SEA.

Behring Sea is the northernmost part of the Pacific Ocean. United States Case, p. 12.

It washes the north-western parts of the coasts of America and the north-eastern part of Asia.

The Pacific and Arctic Oceans are connected by Behring Strait, 48 miles in width.*

From east to west, Behring Sea has an extreme width of 1,260 miles; from north to south, it extends over about 14 degrees of latitude, or more than 800 miles.

The area of Behring Sea is stated in the United States Case to be 873,128 square statute miles. Ibid., p. 11.

The Aleutian and Commander Islands are recognized as marking the southern limits of Behring Sea. Between the Aleutian and Commander Islands, and between the latter and the Kamtschatkan coast, are stretches of open sea 190 and 95 miles wide respectively. The western part of the Aleutian chain forms a widely scattered archipelago, with three open sea stretches of 50 miles or more in width each, and many navigable channels and passes through all parts of this group. So large are the spaces of sea as compared with the lengths of the islands, that from the western end of the Fox Islands to the coast of Asia, a distance of some 1,000 geographical miles, there are about 660 miles of sea, being nearly two-thirds of the entire distance.

The free navigation of the Pacific northward to the Arctic Ocean is, in fact, in no sense interfered with by the intervening islands, but is, and always has been, exercised by all nations through and over all parts of Behring Sea and through Behring Strait.

15 NO NATION CAN CLOSE BEHRING SEA; NOR CLAIM DOMINION OVER IT.

The geographical conditions of Behring Sea, its enormous size, the wide open navigable passes through and to the west of the Aleutians, together with the great width of the northern opening through Behring Strait, renders

* Geographical miles in all cases, unless otherwise stated.

it impossible for any nation practically to close the sea against the ships of other nations.

It is not a land-locked sea, or a sea so surrounded by land as to entitle nations to whom the adjacent territories belong to assert a territorial dominion over it, but is in every sense of the term the high sea.

PRIBYLOFF ISLANDS.

The Pribyloff Islands, upon which are the principal breeding resorts or "rookeries" of the fur-seal in the eastern part of the North Pacific, are situated in Behring Sea, and consist of four small islands. Two of them only—St. Paul and St. George—are at present resorted to by the seals for breeding purposes. These two islands are 40 miles apart.

The Pribyloff group is situated 180 miles to the north of Unalaska Island in the Aleutians, and nearly 300 miles to the west of the mainland of Alaska, these being the nearest island and mainland.

WATERS BETWEEN THESE ISLANDS AND THE MAINLAND CANNOT BE UNITED STATES TERRITORY, NOR WITHIN THEIR TERRITORIAL WATERS.

The position of the Pribyloff group of islands in the open sea is therefore such that no claim could legitimately be made by the nation owning Alaska or the Aleutians to include the intervening sea within its territory, and no justification can be found for any attempt to extend the territorial waters washing their coasts, respectively, beyond the 3 miles recognized by international law, or to treat them as embayed waters.

In the absence of Treaty, or of some claim based on acquiescence, the right of exclusive fishing on the high sea conceded to any country by international law is limited to the 3 miles of territorial waters.

BRITISH VESSELS WRONGFULLY SEIZED.

On general principles of international law, therefore, the places where the British vessels were seized by the United States were not within the territorial waters of the United States, but on the high sea.

ALLEGED CLAIMS OF RUSSIA.

It is contended by the United States that Russia asserted and exercised jurisdiction over Behring Sea not con-
16 sistent with the foregoing principles, and that, either by express consent of other nations or by acquiescence, Russia asserted this jurisdiction effectively.

The important periods for consideration are as follows:

Prior to 1799,
1799 to 1821,
1821 to 1825,
1825 to 1867,
1867 and subsequently.

Prior to 1799.

BEHRING SEA OPEN TO ALL NATIONS.

Behring Sea was one of the vast partially explored seas open to the world.

It had begun to be navigated by all nations, and the right to a highway through the sea at all its openings had been exercised and established; the rights of fishing and trading were also exercised. British Case, p. 20.

Its eastern shores and islands, though not fully explored or known, were being explored by Great Britain, the United States, France, and Russia.

Russian Ukase of 1799.

CHARACTER OF THE FIRST UKASE.

This Ukase deals with the coast of America and the islands, giving commercial privileges to the Russian-American Company. British Counter-Case, p. 11.

The territory was claimed by right of discovery; a right which neither Great Britain nor the United States admitted in negotiations.

The Ukase is purely territorial; it does not claim jurisdiction over the sea, or profess to affect foreigners. The territories were, and were treated as, colonies separated from the Russian Empire by the high seas. The Charter to the Company of 1844 expressly uses the term "colonies" for the territories in America; but for Okhotsk on the Siberian mainland the term used is "province." United States Case, Appendix, vol. i, p. 30.

No Russian legislation for Behring Sea exists; it is not alleged, nor could it be proved, that foreigners in Behring Sea were affected by Russian Laws in general, or by the Ukase in particular.

Russia did not claim, nor does the Ukase pretend, to make Behring Sea *mare clausum*.

The Ukase of 1799 therefore leaves the question of dominion or jurisdiction over Behring Sea untouched. British Case, p. 29 *et seq.*

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The highway to the Arctic Ocean was recognized, and was afterwards used; also fishing rights as on the high sea.

1799 to 1821.

RIGHTS OF THE HIGH SEA CONTINUED TO BE EXERCISED.

Rights of free navigation continued to be exercised unrestrained by Russia.

Russia continued only to enforce her territorial Ukase.

Behring Sea was soon frequented by foreigners competing with the Company in navigation, exploration, and trade. British Case, p. 37.

Russian Ukase of 1821.

CHARACTER OF THE SECOND UKASE.

Ibid., Appendix, vol. ii, Part I, p. 1. Ibid., Part II, No. 1.

Russia did not shut Behring Sea, nor claim it, or any part of it, as territory; she only claimed by this Ukase exclusive sovereignty on territory in America from Behring Straits as far south as 51° N., together with exclusive jurisdiction 100 miles from the coast.

United States Case, Appendix, vol. i, p. 16.

The claim was of territory on land, and jurisdiction to restrain trade along all the coasts of that territory.

The United States claim to territory and dominion in the Behring Sea east of the line of demarcation depends entirely on the cession of 1867 by Russia.

If Russia had not territory and dominion in Behring Sea, she could not cede it to the United States.

1821 to 1825.

NOTIFICATION OF UKASE.

This Ukase of 1821 was notified to Great Britain and the United States.

United States Case, Appendix, vol. i, pp. 16, 24.

The Rules annexed to it, and the Charter issued at the same time, applied to Russian subjects and to foreigners.

PROTESTS OF GREAT BRITAIN AND UNITED STATES.

British Case Appendix, vol. ii p. 14. British Case, Appendix, vol. ii, Part II, No. 2.

A protest was at once entered by both Governments, the British protest being directed both to the claim of exclusive sovereignty over the territories, and of exclusive rights within the maritime limits specified. The United States protest was directed in the same way to every part of the claim: to the claim to the territories south and east of Behring Straits; to the extension of the southern limit from 55° north to 51° north; and to the extension of maritime jurisdiction.

British Case, p. 42, and Appendix, vol. ii, Part I, pp. 3 and 24.

Both protests were at first met by explanations of the reasons for the Ukase: by statements that the Powers were expressly to understand that the entrance to and navigation of Behring Sea had not been affected except within the 100 miles limit, but that this limit was insisted on for the protection of Russian commerce.

18

British Case, p. 44.

After these protests, Russia issued instructions to her cruizers practically suspending the effect of the Ukase in so far as the claim to maritime jurisdiction was concerned.

WITHDRAWAL BY RUSSIA OF HER CLAIM TO MARITIME JURISDICTION.

This withdrawal was notified to Great Britain, and a suggestion made that the delimitation of boundaries should be matter of negotiation.

It was notified also to the United States, and communicated by both Powers to their respective Representatives.

The United States also informed the British Minister to the United States of the same fact, and this withdrawal was made the basis of communications to the Russian Representatives during the negotiations, and was never denied. It was communicated with the consent of the Russian Ambassador in somewhat guarded language to British shipowners. Ibid., p. 43. (Middleton to Adams.) British Case, Appendix, vol. ii, p. 46.

Russia never withdrew or qualified the abandonment of the 100-mile jurisdiction claim, and on this basis the negotiation of the Treaties proceeded.

The abandonment, demanded both by Great Britain and the United States, was not of any specific part of her claim to jurisdiction, nor were certain coasts specified along which this jurisdiction should not be exercised, but she abandoned the *whole claim* to jurisdiction *along the whole of the coasts* of the territories she claimed, and never again revived or attempted to exercise it on any part of the coasts.

The action of the "Apollon" in the case of the "Pearl" was disavowed by the Russian Government. British Case, p. 78.

The United States Treaty of 1824.

The United States having objected to the claim of territory by Russia south and east of Behring Straits, as far south as 51°, and also to the claim of maritime jurisdiction along the shores of that territory; further, Russia having agreed to withdraw that claim of maritime jurisdiction; the Treaty was entered into to carry out the arrange-
19 ments which had been come to. It is therefore obvious that the words of Article I, "any part of the Pacific Ocean," include Behring Sea.

The fact that the United States also contested the extension of the southern boundary does not affect this position.

There was nothing unusual in using the term "Pacific" to include Behring Sea; it was commonly so used in despatches, by writers, and by geographers at that time, and is now; it is used in this sense by all the jurists who have dealt with the Treaties, and by Greenhow, a prominent official of the United States Government, in official publications. British Case, pp. 66, 72, 75.

It was necessarily used in the Treaty in this sense, because the abandoned claim to restrict freedom of navigation and fishing applied to several parts of the Pacific Ocean, viz., Behring Sea, the Sea of Okhotsk, and that part of the Pacific which lies south and east of the Alaskan territory.

The argument that it applied only to the Pacific Ocean south and east of the Alaskan territory, and not to Behring Sea, is disproved by the fact that the 100 miles claim of jurisdiction extended both to the north and to the south of the Aleutians. Its withdrawal, therefore, could not have been confined to the south, to the exclusion of the north, unless it had been expressly so stated.

Other provisions of the Treaty (*e. g.*, Article II, forbidding resort to any point where there was a Russian establishment) manifestly applied to the whole territory claimed by the Ukase.

The British Treaty of 1825.

It is submitted that the Treaties of 1824 and 1825 declared and recognized the rights of the United States and Great Britain to navigate and fish in all parts of the non-territorial waters over which the Ukase purported to extend: that the body of water known as Behring Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825; and that the limited meanings placed on the term "north-west coast" or "north-west coast of America" in the United States Case are incorrect.

Throughout the negotiations which preceded the Treaties, the words "north-west coast" were used to include not less than the whole of the North American coast from Behring Straits to 51° north. If it had been intended to limit this general term to a certain portion of the coast, explicit language would have been used.

One contention of the United States, in effect, limits the "north-west coast" to the *lisière* defined in the IIIrd Article of the Treaty of 1825.

While on the one hand Article VI of the Treaty was confined to the *lisière indiquée*, on the other hand, the reciprocal liberty of access and commerce with each other's territories secured by Article VII was clearly not confined to the *lisière*; the main proposals made with regard to this related to its possession by Russia. The other proposals, including that as to reciprocal liberty of access, related to the whole of the north-west coast. In the words of Mr. Canning, writing in 1824, the object was to secure reciprocal access to the territories of the respective Powers.

British Counter-Case, p. 49.

This was effected by adopting, as Article VII of the British Treaty, Article IV of the United States Treaty, which gave to Russia and the United States a reciprocal right of frequenting for ten years the interior seas on the coast mentioned in Article III of that Treaty. This coast was clearly the whole of the north-west coast from Behring Strait southwards to about 54° 40′, Russia agreeing not to form any establishment south of 54° 40′, and the United States agreeing not to form any to the north of that latitude.

It is submitted, therefore, that Behring Sea is clearly included in the term "Pacific Ocean" in the Treaty of 1825.

ANALYSIS OF THE TREATY.

Article III of the Treaty of 1825 traces the line of demarcation between the two Powers on the coast of the continent and the islands of North-western America.

Article IV defines the Eastern boundary of the *lisière* which was to belong to Russia.

Article V emphasizes the possession of the *lisière* by Russia by reiterating that the reciprocal prohibition against forming establishments in the possessions of the two parties respectively applied in the case of the Russian possessions both to the coast and to the *lisière* comprised within those possessions.

Article VI dealt only with the *lisière*, granting to Great Britain a perpetual right of navigation of all the rivers flowing to the Pacific across the line of demarcation of the *lisière* indicated in Article III.

21 Article VII, on the other hand, dealt with the coast of the continent mentioned in Article III: it gave to the two parties a reciprocal right of visit to all the inland waters, harbours, &c., on this coast: it applied, therefore, to the coast of the whole of the Russian possessions, as well as to the whole of the coast of the British possessions.

If the right of access under Article VII were limited to the coast of the *lisière*, the reciprocal character of the Article would be destroyed.

The text of the Treaty clearly shows, therefore, that the expression "north-west coast" included the whole of the coast on the north-west of the American continent; and that the term "Pacific Ocean" included all the waters washing the north-west coast, including Behring Sea.

This argument is supported by the fact that in the Treaties of 1841, 1843, and 1859, concluded by Russia with Great Britain and other Powers (and which are examined in the British Counter-Case, pp. 51–52), the term "North-west coast of America" is used in a manner showing conclusively that it included the coast of Behring Sea. British Counter-Case, p. 51.

The Treaty of 1859 did not expire till 1869, *i. e.*, after the cession of Alaska to the United States.

The notice issued by the United States in 1845 at the request of Russia warns the United States citizens against infringing the Treaty of 1824 by "resorting to any point upon the Russian-American coast where there is a Russian establishment." This notice clearly applied to all the coast of Behring Sea.

The Cession of Alaska to United States in 1867.

The whole of the Russian territories on the north-west coast of America, together with the islands, were ceded by Russia to the United States Treaty of 1867.

UNITED STATES STATUTES, &C., DEALING WITH ALASKA.

It is submitted that the United States official Acts and Statutes dealing with Alaska Territory next mentioned, whatever their construction, have no force or validity against foreigners, and therefore afford no support to the position assumed by the United States. They are as follows:

The Act of July 1868, section 1, extending the laws United States Case, p. 78.
22 of the United States relating to customs, commerce, and navigation over all the mainland, islands, and waters of the territory ceded to the United States by Russia.

Section 1956, Revised Statutes, Chapter 3, title 23, prohibiting the killing of fur-seals and other animals within the limit of Alaska Territory, or in the waters thereof. Ibid., Appendix, vol. i, p. 96.

"An Act to provide for the protection of the Salmon Fisheries of Alaska, 1889," section 3, declaring that Section 1956, above, shall "include and apply to all the domin- Ibid., p. 99.

ion of the United States in the waters of the Behring Sea:" and that the Proclamation of the President, warning all persons from entering such waters for the purpose of violating the Statutes, shall be published at each United States port of entry "on the Pacific coast."

Ibid., p. 112.

A Proclamation of the United States President in 1889 (and also in 1890, 1891, and 1892), warning all persons entering the waters of Behring Sea, within the dominion of the United States, for the purpose of violating Section 1956, and authorizing seizure of vessels.

It is submitted that the application of these Statutes and official Acts to foreigners is not warranted by the Treaty of Cession of 1867, and cannot be supported by any principle of law.

TREATY OF CESSION, 1867.

United States Case, Appendix, vol. i, p. 46.

The Treaty of Cession contained the following provisions:

ARTICLE I.

[United States translation and construction of the Treaty incorrect.]

"Sa Majesté l'Empereur de Toutes les Russies s'engage . . . . . à céder aux États-Unis . . . . tout le territoire avec droit de souveraineté actuellement possédé par Sa Majesté sur le Continent d'Amérique ainsi que les îles contiguës, le dit territoire étant compris dans les limites géographiques ci-dessous indiquées . . . . ."

A line running through Behring Straits, and thence to the southwest to a point between Attu and Commander Islands, is drawn as "la limite occidentale des territoires cédés, de manière à enclaver dans le territoire cédé, toutes les Iles Aléoutes situées à l'est de ce méridien."

The eastern boundary was the line of demarcation traced by the Treaty of 1825.

23

ARTICLE II.

The right of property in all the vacant lands and public places, &c., is included "dans le territoire cédé."

ARTICLE VI.

" . . . . La cession du territoire avec droit de souveraineté faite par cette Convention, est déclarée libre; . . . . et la cession ainsi faite transfére tous les droits, franchises, et privilèges appartenant actuellement à la Russie dans le dit territorie et ses dépendances."

United States Case, Appendix, vol. i, p. 44. British Case, Appendix, vol. ii, Part III, No. 3.

These articles are thus rendered into English in the United States Case:

ARTICLE I.

"His Majesty the Emperor of All the Russias agrees to cede to the United States, ... all the territory and *dominion* now possessed by His said Majesty on the Continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth . . . . ."

A line running through the Behring Strait, and thence to the southwest to a point between Attu and Commander Islands, is drawn as "the western limit within which the territories and *dominion* conveyed are contained so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

ARTICLE II.

The right of property in all the vacant lands and public places, &c., is included "in the cession of territory and *dominion*."

ARTICLE VI.

". . . . The cession of territory and *dominion* herein made is hereby declared to be free, ... and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or *dominion*, and appurtenances thereto."

In this translation the expression (twice used) "Le territoire avec droit de souveraineté" is translated "the territory and *dominion*."

24 The accurate translation is, "The territory, together with the right of sovereignty."

It expresses not merely a grant of territory, but also of the sovereign rights over such territory. It says nothing of sovereign rights or dominion over the sea. The western boundary-line is drawn not to include as territory or dominion the waters to the east of it, but to show that the islands and territory to the east of it pass to the United States by the cession.

In this translation also the expression "territoires cédés" is translated "the territories and *dominion* ceded."

Such translation is only permissible as a free rendering of the French, and as incorporating the same dominion or sovereignty which is alluded to in Article I, *i. e.*, sovereignty over the ceded territories.

In the VIth Article the expression "le dit territoire et ses dépendances" is translated "the said territory *or dominion* and appurtenances thereto."

The accurrate translation is, "The said territory and its dependencies."

UNITED STATES ARGUMENT AND JUDGMENTS BASED ON SUCH ERRONEOUS TRANSLATION AND CONSTRUCTION.

On these mistranslations of the Treaty of Cession, are founded the United States argument and certain judicial decisions, to the effect that the waters referred to in the Statutes were included in the *dominion* ceded by Russia, and include all Behring Sea to the east of the boundary-line. United States Case, p. 79.

Further, the inference drawn by the United States, and submitted to the Arbitration Tribunal, is that up to the time of the cession Russia continued to claim *dominion* over Behring Sea, relinquishing part of it to the United States; that this *dominion* so claimed forty years after the Treaties of 1824–25 is evidence of British acquiescence in such claim; and that therefore the United States are entitled to have Question 3, and all other questions depending on it, answered in favour of the United States.

A reference to the language of the Treaty of 1867 shows that both arguments and inference are unfounded.

There is nothing to warrant any larger meaning being given to "waters thereof" than the usual meaning, *i. e.*, 3 miles of territorial waters.

Drawing an imaginary boundary-line through the high sea for the purpose of delimitation of territories on either side of it does not warrant the inference that dominion

over the high sea on either side is claimed. Such
25 definition of a boundary-line is the only one possible where the cession is of many islands and rocks, many of which are not named or surveyed, and some of which are even perhaps unknown.

The cession was of all territories within the boundary-line, and the Treaty so expressed it.

An example of the use of water boundary-lines for this purpose is furnished by the United Kingdom Statute defining the limits of New Zealand, which plainly refers only to territories and islands within those limits. Yet the United States, for consistency, assert, contrary to the fact, that Great Britain thereby claims as within the Colony all the high sea within those limits.

United States Case, p. 223.

The United States contention has been shown to depend on an erroneous construction of the Treaty of 1867.

The decisions of the United States Courts condemning British vessels for a supposed breach of the United States sealing laws adopt a similar construction, and are therefore not to be supported.

Three examples of such decisions, with the judgments, are set out in the United States Appendix:

Case of the "Thornton," 1886.

DECISIONS OF UNITED STATES COURTS CITED IN UNITED STATES CASE.

United States Case, Appendix, vol. i, p. 114.

Dawson, J., held that "all the waters within the boundary set forth in this treaty . . . . are to be considered as comprised within the waters of Alaska."

The "Thornton," a British vessel, was seized when fishing 70 miles south-east of St. George Island, the nearest land, and was condemned.

Case of the "Dolphin" and other ships, 1887.

Ibid., p. 115.

Dawson, J., held that Russia had claimed jurisdiction over Behring Sea, and that Great Britain had acquiesced in that claim; that the United States had purchased the sea east of the boundary-line, and that the action of the United States was "a legitimate exercise of the powers of sovereignty under the law of nations, with which no nation can lawfully interfere."

The "Dolphin" and other ships, British vessels, were seized when fishing beyond the 3-mile limit in Behring Sea, and were condemned.

26 *Case of the "James G. Swan," 1892.*

United States Case, Appendix, vol. i, p. 121.

Handford, J., held that Russia had asserted authority over Behring Sea by assuming to transfer to the United States certain territory and dominion with definite boundaries, including a large part of Behring Sea, and that the United States, by the ratification of the Treaty of Cession, acquired a claim of right to exercise authority and sovereignty therein.

The schooner was condemned.

The decisions of the United States Courts in the condemnation of other vessels proceed on the same principles.

Either they were wrong in point of construction, or the Statutes upon which they were founded were *ultra vires* as against foreigners. In neither case do they furnish any justification for the action of the United States.

CONCLUSIONS ESTABLISHED BY FOREGOING ARGUMENT.

The foregoing facts and arguments, it is submitted, conclusively establish that the following answers should be given to the first four questions in Article VI of the Treaty of Arbitration.

To Question 1.—That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that, in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821 only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion, and never afterwards asserted or exercised such rights.

The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

To Question 2.—That Great Britain neither recognized nor conceded any claims of Russia of jurisdiction as to the seal fisheries, *i. e.*, either (*a*) of exclusive jurisdiction in Behring Sea, or (*b*) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

27 *To Question 3.*—That Behring Sea was included in "Pacific Ocean" in the Treaty of 1825.

That Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

To Question 4.—That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

PART II.

Argument addressed to the 5th Question for Decision under Article VI of the Treaty of Arbitration, viz.: Has the United States any Right of Protection or Property in the Fur-seals?

PROPOSITIONS MAINTAINED IN PART II OF THE ARGUMENT OF GREAT BRITAIN.

1. That seals are animals *feræ naturæ*.

2. That the only property in animals *feræ naturæ* known to the law is dependent on possession.

3. That this law is common both to Great Britain and the United States.

4. That the owner of land has the exclusive right to take possession of them while they are on his land; but that right is lost when they leave his land; and when they are on the high sea all alike have the right to take possession of them.

5. That while on the Pribyloff Islands, neither the United States nor their lessees exercise their right to take possession of the seals other than of those actually killed.

And that when the seals leave the Pribyloff Islands and take to the high seas, all exclusive right of the United States is at an end, and all alike have the right to take possession of them.

6. That no right of protection of the seals in Behring Sea or in any other part of the Pacific exists.

28 7. That the claim of a Government to protect animals, which are not their property, on the high sea, and thereby to interfere with the exercise of the rights of fishing which other nations possess, cannot be supported by any known principles of law.

8. That no analogy exists between the rights claimed by the United States and those claimed and exercised by other nations on the high seas, whether as regards fishing laws or otherwise, and that the United States cannot derive any warrant for the right claimed from such fishery or other laws.

British Counter-Case, p. 100. The fur-seal is not only a marine animal, but pelagic in habit, spending most of its time at large in the open ocean. It is migratory in its habit, and in the course of the year traverses a great part of the North Pacific Ocean.

The time in each year during which various classes of fur-seals (or some considerable portion of them) remain on or about the breeding-islands for purposes of reproduction, is from three to five and a-half months. But individual seals (with the exception of the old bulls) frequent the adjacent waters for much of the time of their resort to the islands, and many young males and virgin females probably do not land at all. The average length of stay ashore of the seals is about one-third of the year.

Ibid., p. 101. The food of the fur-seal is entirely derived from the sea.

Ibid., p. 142. The expression "home" or "sole home," applied to the Pribyloff Islands in connection with the fur-seals found in the eastern part of the Pacific, is inadmissible, even on the assumption that all are born there. A migratory animal cannot be said to be "at home" only when in its breeding area. The home of any species is the area within which it habitually lives. Animals may have winter as well as summer homes.

The principal "winter home" of the fur-seals of the eastern part of the North Pacific is the part of the ocean lying off the coast of British Columbia; and there enormous quantities of fish, which would otherwise be available for the support of the inhabitants, are consumed by the seals.

29 The principal "winter home" of the fur-seals of the western part of the North Pacific, is, similarly, in the vicinity of the Japanese coasts. But seals in smaller numbers are to be found in all parts of the North Pacific.

British Counter-Case, p. 142. In the summer months, most of the seals go northwards for breeding purposes. Some go to the Commander Islands, others to the Kurile Islands and Robben Island, others to the Pribyloff Islands.

No special bodies of the seals can be said to resort *entirely and invariably* to one or other of these groups of islands.

Intermingling occurs between the seals of the North Pacific generally, both to the north and to the south of the Aleutian Islands.

The allegation that the identity of individual seals can be established when at sea cannot seriously be advanced.

Ibid., p. 136. Experiments and observation further show that seals born on one of the Pribyloff Islands often land in another year on the other island, and that the relative numbers of seals on the two islands varies from year to year.

The tendency of the slaughter carried on upon the Pribyloff Islands is to drive the seals away from these islands, and many other islands are available as breeding-places.

Ibid., p. 141. The fact of the intermingling of the seals of both sides of the North Pacific, likewise shows that not all the seals found in the eastern part of that ocean can have been born on the Pribyloff Islands.

Ibid., p. 119. The expression "Alaskan herd" is simply a fanciful creation, supposed to lend, by the use of the term "herd,"

some colour to the United States contention of right of property and protection.

The term "herd" is applicable to seals (if at all) only when on the islands, and then only to each rookery separately, or to bodies of seals driven together. Ibid., p. 118.

No distinction, as between the fur-seals resorting to the two sides of the North Pacific, has heretofore been known to naturalists.

30 The alleged distinction recently advanced on the part of the United States is based on the classing of skins by fur-dealers, but such classing, and the differences of price resulting, are no evidence of difference of kind in the fur-seal or in other animals.

The criteria employed by fur-dealers in classing the skins, though important in the trade, are in themselves slight and difficult of definition. In the particular case of fur-seal skins from the Pribyloff and Commander Islands, experienced dealers actually observe a large percentage of skins from each source which would be classed, according to the criteria they employ, as coming from the other.

Though fur-seals are to a certain degree controllable when on land, this results from their helplessness while there, and such control has nothing to do with domestication. British Counter-Case, p. 111.

It is impracticable so to control the seals as to prevent them from going to the sea whenever they desire to do so, and, were it possible so to do, the seals would perish.

While the seals are on the Pribyloff Islands, they are left entirely to their natural inclinations both as to leaving and returning to the islands.

They retain there all their characteristics of animals *ferœ naturæ*.

They are unused to, and incapable of, any but slow and laboured movement on land, and are therefore easily surrounded and driven to the killing-grounds for slaughter.

Such control as is exercised in driving and killing, amounts to no more than preventing those which are selected for killing from escaping. Ibid., p. 112.

The seals dread the approach of man, and endeavour to flee from him, even when collected in great numbers ashore; though it is probable that, when their breeding-places were first visited, ignorance caused them to be fearless. The result of this contact with man has therefore been the opposite of that implied by domestication.

During the greater part of the year, the seals are wholly removed from the cognizance of persons on the Pribyloff Islands; and till very lately their winter haunts were not even known.

31 All ideas attached to the word "domestic" are therefore wanting in the case of fur-seals. Man does not provide their food or in any way assist them to obtain it; his care is at most of a negative kind, and consists in the avoidance of acts which would tend to drive them wholly away from the breeding-islands. They would not suffer, but, on the contrary, would profit, by his departure from these islands.

No scientific authority can be adduced in support of the contention that the seal is other than a wild animal; and it is believed that no opinion from any source which is recognized as entitled to weight can be quoted to such an effect.

Statement of the Law of the United States and Great Britain as to Property in Animals "Feræ Naturæ."

The common law in force both in America and England as to animals *feræ naturæ* is identical.

PROPERTY IN WILD ANIMALS DEPENDENT ON POSSESSION.

This law recognizes no property in animals *feræ naturæ* until possession. Property, while the animals are alive, remains only so long as this possession lasts; when this possession is lost the property is lost. The law considers that they are then wild animals at large, and that the rights of capture revert to all alike.

The owner of land has what is sometimes called a qualified property in wild animals on the land, but this is no more than the exclusive right to take possession while they are there, and when they leave the land that exclusive right is gone.

The following passage is taken from the treatise of the well-known authors, Pollock and Wright, on "Possession in the Common Law," p. 231:

> . . . . Trespass or theft cannot at common law be committed of living animals *feræ naturæ* unless they are tame or confined. They may be in the park or pond of a person who has the exclusive right to take them, but they are not in his possession unless they are either so confined, or so powerless by reason of immaturity that they can be taken at pleasure with certainty. . . . . .

EXAMPLES OF TAKING POSSESSION.

The following examples from decided cases illustrate the nature of possession.

32 Young *v.* Hitchens (6 Q. B. 606), fish only partly in a seine-net were held not to be in possession.

R. *v.* Revu Pothadu (Ind. L. R. 5 Madras 390), fish in irrigation tanks in India were held not to be in possession.

REASON FOR RECOGNITION OF EXCLUSIVE RIGHT.

The law does not give to the owners of land this qualified property as to wild animals on their land by reason of any care, or feeding, of the wild animals, or management which falls short of reducing them into possession: it is rested solely on the fact of the ownership of the land, and the fact that any other person coming on the land to take the animals is a trespasser.

VIOLATION OF THE RIGHT.

The exclusive right to take possession may be violated; but as the right comes to an end when the animals leave

the land in respect of which the right arises, such violation can occur only while the animals are on the land, as by a trespasser taking possession of them.

RAIDING.

Such a violation is committed by raiders on the islands, and the property in the seals taken by them is in the United States.

CASES PUT BY THE UNITED STATES.

With reference to the cases put by Mr. Phelps and Mr. Blaine of killing fish by scattering poison in the sea, destroying them by dynamite, and placing dangerous obstructions and derelicts in the sea to injure commerce or fisheries, it is denied that they present any analogy to the case now under discussion, which is simply that of fishing by lawful methods.

United States Case, Appendix, vol. i, pp. 202, 287.

THIS IS A QUESTION OF RIVAL TRADING MERELY.

All persons alike possess the right of fishing on the high sea, and such fishing, even though it diminish the catch of another, is in all respects analogous to the case of rival traders.

WHICH THE LAW PERMITS.

There is no principle of law in the United States or Great Britain which prohibits rival trading, or gives redress to that one of the traders who may suffer loss in his trade by his rival's exertions.

The exercise of the right to catch the seals on the high sea is a rival trade to the exercise of the right to catch the seals on land. This latter right is of the same character as the former: it only differs by reason of its being exclusive while the seals are on the land.

NO MALICE ALLEGED.

No act of malice towards the United States or the lessees of the Pribyloffs has been, or could be, alleged against the fishermen of Great Britain whose vessels have been seized. The seals are taken by them on the high sea
33 for their profit, and in the exercise of their legal rights of fishing possessed by them in common with all mankind.

PRINCIPLE OF LAW APPLICABLE.

The case therefore falls within the general principle, that where loss results to one by the lawful exercise of a right possessed by another, no reparation can be obtained by law.

It is, therefore, submitted that any rights which the United States possess are not violated by the acts of fish-

ermen of other nations on the high sea; and that there is no principle of law known in Great Britain or the United States by which the contention that there is such a violation can be supported.

Application of Principles of Property and Possession of Wild Animals to Seals.

THE DISTINCTION IS FUNDAMENTAL.

The distinction between the right to take possession of wild animals while they are on the land, and the right of property in such animals, is fundamental to the questions submitted to the Arbitrators.

When the foregoing principles as to property in, and possession of animals *feræ naturæ*, are applied to the case of the seals, the United States contention of property in them, while they are in the high sea, falls to the ground.

NATURE OF UNITED STATES RIGHT TO SEALS WHILE ON PRIBYLOFFS.

The United States or their lessees have only an exclusive right to take possession of the seals while they are on the islands, and this exclusive right is lost when the seals go into the high seas.

They take possession only of such seals as they kill.

THEIR MANAGEMENT IS NOT TAKING POSSESSION.

The alleged management amounts to no more than taking precautions that the seals shall not be driven away, and to regulate the quota of seals to be killed.

NO POSSESSION EXCEPT AT TIME OF CAPTURE, NOR ON HIGH SEA.

The conditions of seal life during the period the seals are in Behring Sea, their excursions to and from the islands into the high sea, and the intermingling of seals from different islands, clearly show that the conditions essential to possession never exist, except at the moment of capture.

While the seals are at sea, there is no power to reproduce at will the physical relations to the animals essential to possession.

RIGHTS OF OTHERS TO CAPTURE.

The possession of the United States is thus seen
34 not to be established while the seals are at sea, and the rights of all to catch the animals on the high sea remain, and were lawfully exercised by the British vessels seized by the United States.

CLAIM OF PROPERTY UNFOUNDED.

The United States claim to property, or to any greater right than an exclusive right to take possession while on

the islands, is therefore, it is submitted, without foundation; and the exclusive right to take possession does not exist at sea.

The allegation in Mr. Phelps' letter, that the seal fishery is "the property of the nation on whose shores it is carried on," begs the question, and is not consistent with any known principle of law. United States Case, Appendix, vol. i, p. 287.

The British contention is that this absence of precedent is fatal to the United States claim, which conflicts with the undoubted right of individuals to fish for seals in the high sea, a right which cannot be diminished or taken away by a Government to which the owners of the right owe no allegiance.

Nor is the United States contention in any way advanced by an appeal to international law.

SOURCE AND FOUNDATION OF INTERNATIONAL LAW.

It is incorrect to say that the best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules.

It may be observed that law so made would not be international law at all. International law is evolved by a more just as well as a more tedious process. Its source is thus stated by Kent:

> The sole source of this law, the fountain from which it flows, whether in its customary, conventional, or judicial-customary shape, is the consent of nations. Kent's "Commentaries on International Law," 2nd edition, by Abdy, p. 4.

And again:

> In cases where the principal jurists agree, the presumption will be very greatly in favour of the solidity of their maxims; and no civilized nation that does not arrogantly set ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law. Ibid., p. 37.

In the case of Triquet *v.* Bath, Lord Mansfield said:

> I remember, in a case before Lord Talbot, of Buvot *v.* Barbut, upon a motion to discharge the defendant (who was in execution for not performing a decree) "because he was agent of commerce, commissioned by the King of Prussia, and received here as such;" the matter was very elaborately argued at the bar, and a solemn deliberate opinion given by the Court. . . . Lord Talbot declared a clear opinion, "That the *law of nations*, in its *full* extent, was *part of the law of England*." . . . "That the *law of nations* was to be *collected* from the *practice* of different nations and the authority of *writers*." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject.
>
> I was counsel in this case; and have a full note of it.
>
> I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian Ambassador.* 3 Burr. 1478 (at p. 1481).

This extract shows it to have been the opinion of Lord Talbot, Lord Hardwicke, and Lord Mansfield, that international law is to be collected from the practice of nations and the authority of writers; and that they and Chief

* The *italics* in this passage are taken from the Report itself.

Justice Holt were agreed in regarding it as part of the law of England.

That branch of international law which deals with the rights of nations, and which owes its existence to the consent of nations, derives its force from well known and recognized principles of justice, while that branch of it which deals with the rights of subjects of different nations is based on principles common to the laws of all nations.

International law does not nor can a Tribunal administering this law create novel principles, antagonistic to such legal principles, nor is there any example which can warrant Mr. Phelps' suggestion that this should be done.

The consent of nations would not be presumed in favour of such novel principles, if, as is assumed above, a precedent is sought to be created on the strength of them; and this consent is essential to the admission of such precedent.

It is, it is submitted, therefore clear that the decision of the Arbitration Tribunal must conform to recognized principles of law.

No other method is sanctioned by the Treaty of Arbitration. That Treaty distinguishes clearly between the questions as to existing rights and the question of future
36 Regulations. The former are dealt with by Article VI, the latter by Article VII. Further, Article V of the *modus vivendi* makes the matter clear. By that Article it is provided that "if the result of the Arbitration be to *affirm the right* of British sealers" compensation shall be made "for abstaining from the exercise of that right" during the Arbitration; and "if the result shall be *to deny the right*" compensation shall be made by Great Britain.

THE LEGAL PRINCIPLES INVOLVED BEING COMMON TO LAWS OF BOTH PARTIES TO DISPUTE, THEIR DECISION MUST CONFORM TO THEM.

When, as in the present case, the rights and duties of the respective parties would be determined by the principles of law common to the two countries in the same way, it is submitted that it is the duty of the Arbitration Tribunal to follow the common principles of the two laws, and no others.

A STATE CAN AFFECT ONLY THE RIGHTS OF ITS OWN SUBJECTS.

A nation has no power to affect by its special Statutes the fundamental rights of possession and property, except with regard to its own subjects and persons within its jurisdiction.

The United States Statutes, under which the British vessels were seized and condemned, as those Statutes are now construed by the Courts of the United States, would affect these fundamental rights with regard to the subjects of other nations, and therefore are *quoad* the subjects of other nations *ultra vires*.

The Claim to Protection apart from Property.

The United States, assuming that their claim to property fails, endeavour to establish an independent right to protect the seals on the high seas.

This is a contention wholly devoid of legal authority.

RIGHT OF A GOVERNMENT TO PROTECT.

The right of a Government to protect the property of its subjects must rest on the same principles as the rights of an individual.

Such rights as the United States may possess to protect the seals are dependent on the existence of property in them.

RIGHT RATIONE SOLI DOES NOT IMPORT RIGHT OFF THE LAND.

The exclusive right to take possession of animals on land, dealt with in the preceding argument, does not carry with it a right to protect such animals when they leave the land.

WHICH WOULD CONFLICT WITH RIGHTS OF OTHERS ON HIGH SEA.

The right of all nations to fish on the high seas is
37 inconsistent with the claim of any nation to protect fish or other free-swimming animals there.

The contingency that fewer seals may resort to the United States islands in consequence of the exercise of this right of fishing on the high sea cannot affect that right, nor entitle the United States to claim that it should be less freely exercised.

RIGHT TO PROTECT APART FROM CLAIM OF PROPERTY.

The United States, however, insist that they have such a right of protection of the seals, in the open waters of the Pacific, independently of the claim to a right of property in the seals. The claim of right thus advanced is novel and unprecedented.

It is obvious that this question is in no way connected with or dependent on the question of concurrent regulations.

An abstract right of protection (such as is here claimed), distinct from a right of property in the animal sought to be protected, cannot exist. It would involve the right to make the protection respected, and therefore an interference with the equality and independence of other nations upon the high seas; an interference which must take the concrete form of a right of visit and search. That such rights do not generally exist in time of peace, except in the case of piracy, is too elementary a proposition to need demonstration. Pelagic sealing is not piracy.

NO RIGHT OF PROTECTION BECAUSE FISH MAY BE GOING TO THE ISLANDS.

Nor is the case altered by the fact that the claim to protect is based on the assumption that the fish may be proceeding to a place within the dominions where an exclusive right to take possession would arise. That no rights exist until this exclusive right has come into being is again too elementary a proposition to need demonstration. For, as Blackstone says:

Stephen's Blackstone, 7th Edit., vol. ii, p. 19.

> All mankind had, by the original grant of the Creator, a right to pursue and take any fish or inhabitant of the waters.

That there is no right of protection at sea even when such qualified property arises on land has already been demonstrated.

NOR ON ACCOUNT OF INTEREST IN INDUSTRY.

United States Case, p. 299.

The contention basing the right of protection on the ground of an interest, an industry, and a commerce cannot be maintained. It must depend on the question whether property has been established or not.

NOR EXCEPT AS AGAINST NATIONALS.

The only right of protection of fish and other free-
38 swimming animals in the high seas which can be exercised by any State (apart from Convention) is as against its own nationals. It may be in the interests of commerce and the fishing industry of the nation that all its fishermen alike should be made to respect a close time, even for migratory fishes, and even in the deep sea. A State has a right to legislate for its own subjects on the high seas.

NATIONALS ON HIGH SEA MAY BE BOUND BY LEGISLATION.—INSTANCE OF SUCH LEGISLATION.

It may be admitted further that it is not necessary that this restriction on national fishermen should be limited to the high seas adjoining the territorial waters of the State. The protection of the Greenland fisheries, situated many miles from the shores of the States which have legislated in respect of it, is an instance in point. But special attention is directed to the condition precedent to such legislation. By the legislation of Great Britain the Queen is empowered to put the Act in force against her own fishermen "*when she is satisfied that other nations interested in these fisheries have put similar Acts in force against their subjects.*" Such legislation rests, therefore, on an agreement between the nations interested, which may be expressed in a Convention, or may be tacitly understood.

Such legislation Great Britain is willing to pass in respect of the seals in Behring Sea; but one essential condition on which Her Majesty's Government insist is, that the other nations interested should pass similar laws.

CONVENTIONS.

On the subject of Conventions and consequent legislation, on which stress is laid in the United States Case, one further point alone need be mentioned at this stage of the Argument. The same power which a State has over its nationals on the high sea enables it to delegate the enforcement of the agreed regulations to the other Contracting Party.

Beyond this, it is submitted, the legislative powers of a State cannot go; the limitations on the powers here indicated depend entirely on constitutional law.

No warrant for any larger power, such as is claimed by the United States, can be found in any known principle of international law.

As to the reference to the "Laws of Natural History" there is no known code of such laws, and as to the "common interests of mankind" these must be tested by, and dealt with upon, legal principles.

NO PRACTICE HERE SHOWN TO WARRANT THE RIGHT OF PROTECTION CLAIMED.

39 The same argument affords a complete answer to the suggestion, that the right of protection on the high seas against all comers depends on the practice of nations. If the United States had shown that all nations claimed to exercise such a right of protection as is claimed by the United States, or even that a large proportion of the nations made such a claim, the argument that the right had passed, or was passing, into the law of nations might have some force; but the examination of the laws cited by the United States, to which this Argument will next proceed, shows that the position taken up by the United States on this point is absolutely untenable.

CLAIM TO PROTECTION WITHOUT PROPERTY FAILS.

Her Majesty's Government, therefore, submit that the United States claim to protect the seals in the high seas, and beyond the territorial waters, in so far as such claim is independent of an alleged property in such seals, absolutely fails.

It remains to be seen how far the practice of nations supports the contention of the United States in regard to the claim to protection or property.

United States Argument from suggested Analogy of Laws of other Nations Considered and Answered.

The claim of the United States to rest their Case on the precedents of the laws of other nations forms a distinct branch of their Case, and requires to be specially considered.

OBJECTS OF UNITED STATES ARGUMENT FROM LAWS OF OTHER NATIONS.

Such laws are referred to, by the United States, for three objects:

United States Case, p. 221.

1. To endeavour to prove a uniform practice of nations to protect seal life from destruction by means of extra-territorial legislation.

Ibid., p. 231.

2. To endeavour to show a uniform practice of nations of extending the provisions of their fishery laws beyond the 3-mile limit; and of making these provisions applicable to foreigners.

Ibid., p. 237.

3. To show that other examples of extra-territorial jurisdiction are to be found in the laws of other nations.

DEDUCTIONS DRAWN FROM SUCH LAWS.

The deductions desired to be drawn by the United States from the examples cited are:

From 1. That the United States law under which British vessels have been seized is justified by the laws of other nations for the protection of seals.

From 2. That this law is justified by analogy to the fishery laws of other nations; and

That the application of this law to foreigners beyond the 3-mile limit is also justified by example and analogy.

From 3. That the law, and more especially in its application to foreigners beyond the 3-mile limit, is further justified by analogy of other extra-territorial laws not dealing with fisheries.

It is proposed to demonstrate in the following Argument that these premises are not well founded, and that the position assumed by the United States is untenable.

With regard to the argument from the practice of other nations, or from analogy to the practice of other nations, it is submitted that the following propositions can alone be maintained.

GENERAL PRINCIPLES ON WHICH ANY EXCEPTION MUST REST.

To warrant any exceptional departure from the principles commonly accepted by all nations as part of the law of nations, it is essential that there should be an agreement between all—

1. As to the sufficiency of the causes calling for such exceptional legislation.

2. As to the means for remedying such causes, *i. e.*, as to the purport of such legislation.

This follows from the fundamental principle on which the law of nations rests, viz., consent of nations.

British Counter-Case, p. 86.

This subject has already been dealt with, but it is necessary to examine categorically the examples of extra-territorial legislation adduced by the United States in order to show that they utterly fail to support the argument for which they are cited.

In support of the first proposition advanced—that seal life is protected by extra-territorial laws of other nations, the instances adduced by United States are the following:

British.

The Falkland Islands.
New Zealand.
Cape of Good Hope.
Canada.
Newfoundland.

Foreign.

Sweden.
Norway.
Russia.
Germany.
Holland.
} With reference to the Greenland or Jan Mayen fisheries.

41 Russia.
Uruguay.
Chile.
Argentine Republic.
Japan.

THE FALKLAND ISLANDS.

The Act providing a close time for seals is No. 4 of 1881. It recites that the seal fishery of the islands was once a source of profit to the colonists, but has been exhausted by indiscriminate and wasteful fishing, and that it is desirable to revive and protect this industry by the establishment of a close time *within the limits of this Colony and its dependencies.* United States Case, Appendix, vol. i, p. 435.

The Statute then enacts that a close time shall be observed *"within the limits of this Colony and its dependencies"* from the 1st October to the 1st April.

The words italicized have a special meaning. The powers of a Colonial Legislature are well known; they have been defined by the Judicial Committee of the Privy Council; and their limitation to the Colony and its territorial waters is not only understood, but is enforced.

Yet the United States, instead of referring to long-established principles, prefer to rest their contention that the Colony would interpret this Statute on different principles, and extend its provisions to the high seas, on the deposition of James W. Budington, an American master mariner and sealer, in which he merely expresses what his opinion and understanding of the matter are. United States Case, p. 221, and Appendix, vol. ii, p. 593.

There is no evidence to support the contention that the Statute would, or could, be enforced on the high sea.

NEW ZEALAND.

The Statute No. 43 of 1878 for the protection of seals establishes a close season; no reference is made to waters, but the Governor may by order exclude any part of the Colony from the provisions of the Statute. Ibid., Appendix, vol. i, p. 436.

A "public fishery" is defined to be "any salt or fresh waters in the Colony, or on the coasts or bays thereof;" it includes artificial waters, and extends to the ground under such water.

42 Further, it is provided that offences against the Act committed on the sea-coast or at sea within 1 marine league of the coast are to be deemed as having been committed in a "public fishery."

"The Fisheries Conservation Act of 1884" applies to certain waters of the Colony, the term "waters" being defined to mean "any salt,

fresh, or brackish waters in the Colony, or on the coasts or bays thereof." The Governor is enabled to make regulations for the protection of fish, oysters, or seals.

By "The Amendment Act No. 27 of 1887" the penalty for violating the principal Act in its application to seals is increased.

Vessels illegally taking seals are declared to be forfeited, and Her Majesty's vessels and officers are empowered to seize such vessels "*if found within the jurisdiction of the Government of the Colony of New Zealand.*"

The Act also allows vessels within the same jurisdiction to be searched.

United States Case, p. 223. With regard to this legislation of New Zealand, the United States Case contains an extraordinary mis-statement:

> The area designated as "the Colony" is taken to mean the area specified in the Act [26 & 27 Vict., cap. 23, sec. 2] creating the Colony, which defines its boundaries as coincident with parallels 33° and 53° south latitude, and 162° east and 173° west longitude.
>
> * * * * *
>
> The definition in the Act [The Fisheries Conservation Act, 1884] of the term "waters" indicates that it applies to the entire area of the Colony, of which the south-eastern corner is over 700 miles from the coast of New Zealand, although a few smaller islands intervene.

Ibid., Appendix, vol. i, p. 437. In the Map in the United States Case an area coloured pink is shown, comprising the waters between the limits of latitude and longitude, to found the contention that these waters are included within the colonial limits.

The words of the Imperial Statute 26 & 27 Vict., cap. 23, sec. 2, above referred to, nevertheless, are clear and explicit, and are not capable of being misunderstood.

The designation of the Colony in that Statute is as follows:

Ibid., p. 436. The Colony of New Zealand shall, for the purposes of the said Act and for all other purposes whatever, be deemed to comprise *all territories, islands, and countries lying between* 162° east longitude and 173° west longitude, and between the 33rd and 53rd parallels of south latitude.

Only the territories, islands, and countries *lying between* these limits of latitude and longitude are thus seen to be included within the Colony.

43 The argument here shown to be fallacious is the same as that by which the United States claim to treat Behring Sea as ceded territory.

CAPE OF GOOD HOPE.

The only Regulation affecting the question in this Colony is a "Cape Government Notice" of 1844, which is as follows:

British Commissioners' Report, p. 194. His Excellency the Governor, having been pleased to decide that the seal island in Mossel Bay shall not be granted on lease for the present, hereby prohibits all persons from disturbing the seals on the said island, and warns them from trespassing there after this notice on pain of prosecution.

United States Case, p. 224. United States Case, Appendix, vol. ii, p. 576. Ibid., p. 596. The United States evidence as to this Colony is that of W. C. B. Stamp, who says that he "knows nothing about it;" and of G. Comer, who states that he would not dare to take seals in the waters adjacent to the rookeries.

CANADA.

The Fisheries Act, 1886, 49 Vict., cap. 95, prohibits the killing of whales, seals, or porpoises with explosive instruments, and during seal-fishing time from disturbing or injuring any sedentary seal fishery, or from frightening the shoals of seals coming into such fishery.

The United States' statement in respect of this Statute is that it prohibits all persons without prescribing any marine limit; and the inference drawn is that it applies to all persons on the high seas, including foreigners. United States Case, p. 225.

This erroneous inference will be disposed of by the consideration of the principles of construction of Colonial Statutes to be presently dealt with.

44 NEWFOUNDLAND.

The Seal Fishery Act, 1879, 42 Vict., cap. 1, established a close time for seals, and prohibits the killing of "cats" (immature seals) in order more efficiently to preserve this close time. Steamers are not allowed to leave port before a certain day. United States Case, p. 225. Ibid., Appendix, vol. i, p. 442.

The Seal Fishery Act, 1892, provides more stringent regulations for the observance of the close time, and heavier penalties for leaving port before a certain day.

Seals killed in breach of the close time are not to be brought into any port of the Colony or its dependencies under a penalty of 4,000 dollars.

Steamers are forbidden from going on a second trip in any one year, and if they shall engage at any time in killing seals at any place within the jurisdiction of the Supreme Court of Newfoundland after returning from the first trip they shall be deemed to have started on a second trip.

UNITED STATES CONCLUSIONS FROM FOREGOING BRITISH STATUTES.

From these Statutes the following conclusions are drawn in the United States Case: United States Case, p. 225.

1. That Great Britain and its dependencies do not limit their Governmental protection to the fur-seal; it is extended to all varieties of seals wherever they resort to British territorial waters.

2. And they have thrown about them upon the high seas the guardianship of British Statutes.

It is admitted that the principle of providing a close time for seals has been adopted by British legislation as essential to the preservation of seal life.

It is denied that any country has the power to enforce such close-time regulations beyond the territorial waters against subjects of a foreign nation, though it may do so as regards its own subjects; and neither Great Britain nor her Colonies have ever departed or attempted to depart from this principle.

UNITED STATES INFERENCES UNWARRANTED.

It is denied that the inferences drawn by the United States in respect of the legislation of some of the Colonies already considered are warranted. The principles of English law show conclusively that such inferences are unsound; it has already been shown they are not in accordance with the facts; and no evidence has been adduced by the United States to support them.

In the case of the Falkland Islands, the conditions
45 recited in the preamble of the Statute are identical with those which are alleged to exist as to the seals in the North Pacific, and the colonial legislation has been framed in strict accordance with the principles contended for by Great Britain.

Neither Great Britain nor her Colonies, under circumstances of seal life precisely identical with those of the seals in the North Pacific, have attempted to establish a right of property in or protection of the seals frequenting and breeding on their shores when they leave the territorial waters.

GREENLAND OR JAN MAYEN FISHERIES.

United States Case, p. 227. The second group of enactments of other countries referred to in the United States' Case are based upon Conventions; they therefore lend no support to the United States' contention, that they can by their independent action claim to enforce such regulations against the subjects of other nations in respect of fishing in the high sea.

The enactments in question are those of Great Britain, Sweden, Norway, Russia, Germany, and Holland. They all deal with the Jan Mayen seal fisheries in the Atlantic east of Greenland; and proceed on the principle here enunciated.

LEGISLATION AS TO GREENLAND FISHERY.

38 Vict., cap. 18. The first section of "The Great Britain Greenland Seal Fishery Act of 1875" is shortly as follows:

> When it appears to Her Majesty in Council that the foreign States whose ships or subjects are engaged in the Jan Mayen fishery . . . have made or will make with respect to their own ships and subjects the like provisions to those contained in this Act, it shall be lawful for Her Majesty, by Order in Council, to direct that this Act shall apply to the said seal fishery.

The legislation of the other countries is conceived in a similar spirit, and was passed after negotiations between their respective Governments.

The necessary legislation having been provided, the Queen, by Order in Council, dated the 28th November, 1876, put the Act in force against her own subjects.

46 PRINCIPLES OF FISHERY CONVENTIONS.

United States Case, p. 237. The great difficulty of effectively maintaining a close time in distant fisheries in the high seas, and of protecting and regulating such fisheries, except as against subjects, has in many instances been dealt with by Conventions, as is stated in the United States Case.

These Conventions proceed on principles well established.

These principles are:

1. The determination of the limits of the exclusive fisheries of the respective parties to the Convention.

2. Except as expressly varied by agreement the respective national jurisdictions are preserved intact.

3. It is only by agreement that jurisdiction on the high sea over its nationals is given by one nation to another.

These principles do not advance the United States contention. The consent of other nations is wanting to the exercise by the United States of the exclusive control which it claims.

ARGUMENT TO BE DEDUCED FROM EXISTENCE OF CONVENTIONS.

The existence of the Conventions demonstrates their necessity; by such Conventions alone can one nation presume to control the subjects of another State upon the high seas.

They recognize the right of the subjects of all the Contracting Parties alike to fish in the high sea beyond the territorial waters, but for their mutual benefit they subject the fishing to regulations to be observed by the subjects of all alike. The Conventions and the legislation giving effect to them do not profess to impose these regulations on the subjects of other countries not parties to the Conventions, nor to prohibit them in any way from fishing in the high seas, nor could they do so.

RUSSIA.

EXAMINATION OF FOREIGN SEAL LEGISLATION.

White Sea.

The Russian law dealing with the Ustinsk sealing industry in the White Sea is set out in the United States Case. United States Appendix, vol. i, p. 445.

47 The industry is carried on in the Gulf of Mesensk in the White Sea; the gulf is 53 miles wide.

The principal provisions of the law are the appointing certain days of departure to the fisheries, and prohibiting the lighting of fires to windward of the groups or hauling-grounds of the seals.

The law is not directly or indirectly applied to foreigners.

Further, Article 21 of the Russian Code of Prize Law of 1869 limits the jurisdictional waters of Russia to 3 miles from the coast. British Case, Appendix, vol. ii, Part II, p. 22.

Behring Sea and Sea of Okhotsk.

This Article applies to the western shores of Behring Sea, and the regulations published at Yokohama in 1881, with respect more especially to sealing off the Commander and Robben Islands, are inconsistent with the United States contention as to Russia's claims to jurisdiction. British Case, p. 116.

The prohibitions contained in these regulations were explained by M. de Giers in a letter to Mr. Hoffmann. Ibid., Appendix, vol. ii, Part II, No. 16, pp. 19-20.

This measure refers only to prohibited industries and to the trade in contraband:

"The restrictions which it establishes extend strictly to the territorial waters of Russia only."

Caspian Sea.

United States Case, p. 228, Appendix, vol. i, p. 445.

The fishing and sealing industries in the Caspian Sea are also dealt with by law, which expressly declares that the catching of fish and killing of seals in the waters of the Caspian included in the Russian Empire are free to all who desire to engage in the same, except in certain specified localities, under observance of the established rules. A close time is appointed.

The Caspian Sea is a land-locked sea included within the territorial dominions of Russia and Persia, and the regulations have no bearing on the questions involved in the right of fishing in Behring sea.

48 URUGUAY.

United States Case, p. 229, Appendix, vol. i, p. 449.

The law of Uruguay establishes a close time for seals on the Lobos and other islands on the coasts of Rio de la Plata, and in that part of the ocean adjacent to the Departments of Maldonado and Rocha.

British Counter-Case, p. 90.

It is in no sense extra territorial.

The provision prohibiting vessels of any kind from anchoring off the islands, and the construction of works that might frighten away the seals, is territorial.

CHILE.

Ibid., p. 91.

The Ordinance of 1892 allows only Chileans and foreigners domiciled in Chile to engage in the pursuit on land or at sea of seals and otters *in the coasts, islands, and territorial waters of the Republic.*

Foreign vessels are prohibited from engaging in this industry.

United States Case, p. 229.

This Law is obviously not extra-territorial, but it is appealed to in support of the United States contention of a right of property and protection on the high sea, to which it is diametrically opposed.

British Counter-Case, p. 91.

The principles on which the British contention is based are expressly laid down in the Chilean Code.

ARGENTINE REPUBLIC.

The laws of the Republic are not set out in the United States Appendix. The statement in the United States Case is merely that protection is given to the fur-seals resorting to the coasts; it is not stated that the regulations are extra-territorial, or that they apply to foreigners.

JAPAN.

United States Case, p. 229. Appendix, vol. i, p. 449.

Japanese law deals with hunting and killing seals and sea-otter in the Hokkaido, *i. e.*, Yezo, and certain islands to the north belonging to Japan.

British Counter-Case, p. 93.

49 The law is not extra territorial, and the Japanese Government have stated that they consider that there are no means of checking foreign fishermen outside the line of territorial limits fixed by international law.

CONCLUSION FROM FOREIGN LAWS.

None of the countries above specified profess to control the killing of seals by extra-territorial provisions, or by interfering with foreigners on the high seas, or in any other way than in accordance with the principles already established; nor do they profess to claim a property in or a right of protection of seals in the high sea.

The first contention of the United States, that seal life is protected by extra territorial laws of other countries applicable to foreigners, is therefore shown to be without foundation.

EXAMINATION OF SECOND CONTENTION OF THE UNITED STATES AS TO LAWS OF OTHER NATIONS.

A further contention of the United States is that, not seal fisheries only, but other fisheries, are protected by extra-territorial laws of other nations, and that they are extended to foreigners.

The contention is based on the following examples:

British.

Irish oyster fisheries.
Scotch herring fisheries.
Ceylon pearl fisheries.
Queensland and West Australian pearl fisheries.

Foreign.

France.
Algerian coral fisheries.
Italian coral fisheries.
Norwegian whale fisheries.
Colombian pearl fisheries.
Mexican pearl fisheries.

From these examples, an inference is attempted to be drawn that the United States are warranted in demanding from other nations acquiescence in their claim that their legislation for Alaska should apply to the seal fishery in Behring Sea.

EXAMINATION OF BRITISH FISHERY LEGISLATION.

The contention that British fishery legislation is extra-territorial, or, if extra-territorial, that it extends to foreigners, remain to be considered.

50 It is later pointed out that considerations apply to the case of oyster, pearl, and coral fisheries, which have no application to the case of free swimming fish or animals. (*Post*, p. 59.)

IRISH OYSTER FISHERIES.

The law dealing with the oyster fishers on the coast of Ireland is shortly as follows:

The Statute permits the Irish Fishery Commissioners to regulate, by bye-laws, oyster dredging on banks 20 miles to 31 and 32 Vict., cap. 45, sec. 67.

seaward of a certain line drawn between two headlands on the east coast of Ireland.

Within this line the extreme depth of indentation is not more than 5 miles.

The Act provides that the bye-laws are to apply equally to all boats and persons on whom they may be binding; but they are not to come into operation until an Order in Council so directs.

The Order in Council is to be binding on all British sea-fishing boats, and on any other sea-fishing boats specified in the Orders.

The facts which have occurred since the passing of the Statute are as follows:

The Commissioners have made a bye-law appointing a close time.

The bye-law was put in force by Order in Council of the 29th April, 1869.

The Order recited the power given to the Queen by the Act to specify other besides British boats to which the bye-law was to apply.

No other boats were so specified.

The law is therefore expressly limited to British boats within the 20 miles. It cannot by the terms of the Act itself apply to any foreign boats.

It would be contrary to the principles on which British legislation invariably proceeds that bye-laws should apply to foreign boats outside the 3-mile limit, unless power to enforce such a bye-law against the boats of any nation had been acquired by Treaty.

The provision was inserted in the Act to provide for the case of any such Treaty being entered into.

Thereafter, without such enabling provision in the
51 Act, the Queen would possess no power to make an Order in Council bringing foreigners within the Act.

United States Case, p. 232. The statement made in the United States Case is therefore inaccurate.

Scotch Herring Fisheries.

By the Act of 1887, 52 & 53 Vict., cap. 23, a close time is provided, and trawling is prohibited within the north-eastern indentation of the coast of Scotland: the line of limit is drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, a distance of 80 miles.

Penalties are imposed on any person infringing the provisions of the Act.

Ibid., p. 233. Stress is laid in the United States Case on the words "any person;" and the statement is made that "the Act is not confined in its operations to British subjects."

This statement is at variance with the principles of English legislation and the practice of the English Courts in interpreting Statutes.

(*Post*, p 56.) "Any person" is a term commonly used in English Statutes dealing with offences, and it is invariably applied to such persons only as owe a duty of obedience to the British Parliament.

CEYLON PEARL FISHERIES.

The pearl fisheries on the banks of Ceylon, which extend from 6 to 21 miles from the coast, are subject to the Colonial Act of 1811, which authorizes the seizure and condemnation of any boat found within the limits of the pearl banks, or hovering near them.

United States Case, p. 253. Appendix, vol. I, p. 461. British Counter-Case, pp. 93, 94.

These pearl fisheries have been treated from time immemorial by the successive rulers of the island as subjects of property and jurisdiction, and have been so regarded with the acquiescence of all other nations.

The principles governing the occupation of such pearl fisheries will be dealt with at a later stage of this Argument; for the present it is sufficient to indicate the proposition which Great Britain will maintain by a quotation from Chief Justice Cockburn, in Reg. *v.* Keyn:

(*Post*, p. 59.)

L. R., 2nd Ex. D. 63.

> 52 Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory.

The special application of this principle to the Ceylon fisheries was thus treated by Vattel:

"Droit des Gens," I, sec. 287.

> Who can doubt that the pearl fisheries of Bahrien and Ceylon may lawfully become property?

AUSTRALIAN PEARL FISHERIES.

In the United States Case reference is thus made to the Australasian fishery laws:

> These Statutes extended the local regulations of the two countries mentioned (Queensland and Western Australia) to defined areas of the open sea, of which the most remote points are about 250 miles from the coast of Queensland, and about 600 miles from the coast of Western Australia.

United States Case, p. 234. Appendix, vol. I, pp. 467–469. British Counter-Case, p. 94.

It suffices to point out that these Statutes are in express terms confined to British ships and boats attached to British ships.

Foreign Fishing Laws discussed.

FRANCE.

> By the Decree of the 10th May, 1862, certain fisheries are allowed to be temporarily suspended over an extent of sea beyond the 3-mile limit if it is necessary for the preservation of the bed of the sea, or of a fishery composed of migratory fishes. The suspension will be ordered on the request of the "prud'hommes des pêcheurs," or, in their absence, of the "syndics des gens de mer."

United States Case, p. 234. British Counter-Case, p. 94–95.

There is no evidence that this law is applied to foreigners.

On the contrary, there is evidence that, apart from Conventions, France only legislates for foreign fishermen within the 3-mile limit.

Article 1 of Law 1 of March 1888 lays down:

> Fishing by foreign vessels is forbidden in the territorial waters of France and Algeria within a limit which is fixed at 3 marine miles to sea from low-water mark.

seaward of a certain line drawn between two headlands on the east coast of Ireland.

Within this line the extreme depth of indentation is not more than 5 miles.

The Act provides that the bye-laws are to apply equally to all boats and persons on whom they may be binding; but they are not to come into operation until an Order in Council so directs.

The Order in Council is to be binding on all British sea-fishing boats, and on any other sea-fishing boats specified in the Orders.

The facts which have occurred since the passing of the Statute are as follows:

The Commissioners have made a bye-law appointing a close time.

The bye-law was put in force by Order in Council of the 29th April, 1869.

The Order recited the power given to the Queen by the Act to specify other besides British boats to which the bye-law was to apply.

No other boats were so specified.

The law is therefore expressly limited to British boats within the 20 miles. It cannot by the terms of the Act itself apply to any foreign boats.

It would be contrary to the principles on which British legislation invariably proceeds that bye-laws should apply to foreign boats outside the 3-mile limit, unless power to enforce such a bye-law against the boats of any nation had been acquired by Treaty.

The provision was inserted in the Act to provide for the case of any such Treaty being entered into.

Thereafter, without such enabling provision in the
51 Act, the Queen would possess no power to make an Order in Council bringing foreigners within the Act.

United States Case, p. 232. The statement made in the United States Case is therefore inaccurate.

Scotch Herring Fisheries.

By the Act of 1887, 52 & 53 Vict., cap. 23, a close time is provided, and trawling is prohibited within the north-eastern indentation of the coast of Scotland: the line of limit is drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, a distance of 80 miles.

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This statement is at variance with the principles of English legislation and the practice of the English Courts in interpreting Statutes.

(*Post*, p 56.) "Any person" is a term commonly used in English Statutes dealing with offences, and it is invariably applied to such persons only as owe a duty of obedience to the British Parliament.

Even if the bays shown on the United States Map are intended to be included in the application of the law as is suggested in the United States Case, the claim must be justified, if at all, on the principle of waters of the territory previously referred to and subsequently explained. (*Post*, p. 59.)

MEXICAN PEARL FISHERIES.

The United States Case states— United States Case, p. 236.

that along the coast of Lower California the pearl-beds have been made the subject of special exclusive grants to private individuals, and have been divided for this purpose into two belts: the inner belt extending seaward for 3 miles (5 kilom.), and the other belt for 6 miles (10 kilom.). Ibid., Appendix., vol. i, p. 491.

Foreign vessels are admitted generally to the Mexican fisheries if they comply with the laws and regulations. British Counter-Case, p. 97.

The only claim made by Mexico is to regulate all fishermen alike; but with regard to English fishermen, attention is drawn to the provisions of Article IV of the Treaty of 1888 between Great Britain and Mexico, by which the two Powers agree to 3 miles as the limit of their territorial waters.

55 THE UNITED STATES CONTENTION NOT SUPPORTED BY FOREIGN LAWS.

These are the only foreign laws set out by the United States, and it may be assumed that there are no laws of any other countries on which the United States could rely to support their claim, either directly or by analogy.

Her Majesty's Government submit that these laws do not support the United States contention.

EXAMINATION OF LEGAL PRINCIPLES.

STATEMENT OF LEGAL PRINCIPLES REFERRED TO IN ANALYSIS OF BRITISH AND FOREGIN LAWS.

Throughout the foregoing discussion of the legislation of various nations, certain principles of law have been referred to, the full explanation of which had necessarily to be postponed until the examinations were completed.

For convenience these principles will now be collected, and will then be separately examined:

(I.) That by the universal usage of nations, the laws of any State have no extra-territorial application to foreigners, even if they have such application to subjects.

(II.) That Great Britain has incorporated this principle into her own law by a long-established usage, and a series of decisions of her Courts; and that the law of the United States is identical.

(III.) That the British Colonies have no power to legislate for foreigners beyond the colonial limits.

(IV.) That international law has recognized the right to acquire certain portions of the waters of the sea and the soil under the sea, in bays, and in waters between islands and the mainland.

(V.) That the analogy attempted to be traced by the United States between the claims to protect seals in Behring Sea, and the principles applicable to coral reefs and pearl-beds, is unwarranted.

(VI.) And, finally, that there is no complete or even partial consent of nations to any such pretension as to property in, and protection of, seals as set up by the United States.

I.

EXTRA-TERRITORIAL LAWS OF A STATE HAVE NO APPLICATION TO FOREIGNERS.

It is submitted that, as well by international and constitutional law as by the common consent and practice of nations, the laws of a State have no application to foreigners beyond the territorial limits of that State;
56 and that if they are declared to have an extra-territorial application, it is limited to subjects of that State who may fall within its provisions.

The fundamental principle which governs the application of laws is expressed in the maxim, *extra territorium jus dicenti impune non paretur.*

No general propositions are clearer than these.

All persons are subject to the laws of a country in which they are.

No person is subject to the laws of a country in which he is not.

The only exception is that subjects may be legislated for by their own Legislature, even though they are abroad, the enforcement of any punishment being reserved till such time as they return to their own country.

These principles are of equal force on the high seas.

In ships on the high seas, no one is subject to any jurisdiction but that of his own country, or of the country to which the ship belongs. The laws of other countries do not bind him, and he may disregard them with impunity.

II.

THE LAWS OF GREAT BRITAIN HAVE NO EXTRA-TERRITORIAL APPLICATION TO FOREIGNERS.

It may be conclusively demonstrated that Great Britain has incorporated this principle into her municipal law by a long established usage, and by a series of decisions of her Courts.

L. R., 2 Ex. D. 63. In Reg. *v.* Keyn, Cockburn, C. J., said:

> Where the language of a Statute is general, and may include foreigners or not, the true canon of construction is to assume that the Legislature has not so enacted as to violate the rights of other nations.

See also the case of the "Zollverein," cited in British Counter-Case, p. 99. This is the answer to the argument of the United States, based upon the words "any person" in British and Colonial Statutes.

The intimate connection between the national law and the international law is indicated in the Judgments now quoted.

QUOTATIONS FROM ENGLISH JUDGMENTS.

In the case of "Le Louis," Lord Stowell said: 2 Dodson, 239.

Neither this British Act of Parliament nor any Commission founded on it can affect any right or interest of foreigners unless they are founded on principles and impose regulations that are consistent with the law of nations; that is the only law that Great Britain can apply to them, and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto.

57 So in Cope *v.* Doherty, Lord Justice Turner said: 2 De Gex. and J. 614.

This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners; in order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it very clear.

So in Jeffreys *v.* Boosey, Baron Parke said: 4 H. L. Cases, 926.

The Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom; the Legislature can impose no duties except on them, and when legislating for the benefit of persons must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interest the Legislature is under a correlative obligation to protect.

A remarkable application of this principle occurred in the case of *ex parte* Blain *re* Sawers. The question arose as to the application of the English Bankruptcy Law to foreigners in England; the definitions of acts of bankruptcy in the Statute include the commission of certain acts "in England or elsewhere;" yet it was held by the Court of Appeal that a foreigner in England, although on general principles he was subject to English law, could not be made bankrupt unless he had committed an act of bankruptcy in England. The words "or elsewhere" were held not to apply to such a foreigner on the principles above stated. L. R. 12 Ch. D. 500.

It is unnecessary further to cite authorities; one more quotation from Chief Justice Cockburn's judgment in Reg. *v.* Keyn will suffice: L. R., 2 Ex. D. 63.

The argument is that the language of the Statute (of Henry VIII as to offences on the sea) being general in its terms, it must be taken to have included foreigners as well as subjects. No doubt these words are large enough to include foreigners as well as subjects, but so they are to include the entire ocean as well as the narrow seas; and it cannot be supposed that anything so preposterous was contemplated as to make foreigners liable to the law of this country for offences committed on foreign ships all over the world.

It is submitted that the Statute under which the British vessels were seized and condemned was either wrongly interpreted, or was *ultra vires*.

58

III.

COLONIES HAVE NO POWER OF EXTRA-TERRITORIAL LEGISLATION FOR FOREIGNERS.

It may further be demonstrated that Great Britain has not assumed to grant to her Colonies any larger legislative power than she assumes to possess herself; and that the Colonial Legislatures cannot assume to themselves any power of extra-territorial legislation for foreigners, as is alleged in the United States Case.

On this point, it would be sufficient to refer to the words of "The Territorial Waters Jurisdiction Act, 1878," which defines the territorial waters "adjacent to the United Kingdom or any other part of Her Majesty's dominions" to extend no further than 1 marine league from low-water mark.

The Judicial Committee of the Privy Council have expressly declared the limits of the Colonial Legislative Power.

L. R., 1891, A. C. 445. In Macleod *v.* Attorney-General for New South Wales the colonial law as to bigamy was considered.

The section enacted that—

> Whosoever being married marries another person during the life of the former husband or wife, wheresover such second marriage takes place, shall be liable to penal servitude for seven years.

Here were general words similar to the words "any person" so much relied on by the United States.

The Judicial Committee nevertheless rejected their general application. They said:

> The colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed inconsistent with the most familar principles of international law.
>
> * * * * *
>
> The words "Whosoever being married" mean "whosoever being married and who is amenable at the time of the offence committed to the jurisdiction of the colony."
>
> * * * * *
>
> "Wheresoever" may be read, "Wheresoever in this colony the offence is committed."

And so, both in case of colonial laws and in the case of English laws, the words "any person" mean "any person subject to the jurisdiction of the Legislature passing such laws," subject, that is, in accordance with the prin-
59 ciples of international and constitutional law here explained.

The contention of the United States that the British colonial laws warrant, or afford some analogy to, the Alaskan Seal Statute, is entirely devoid of foundation.

IV.

HOW FAR INTERNATIONAL LAW RECOGNIZES A RIGHT TO POSSESSION OF PARTS OF THE BED OF THE SEA.

It is next submitted—

That international law recognizes the right of a State to acquire certain portions of the waters of the sea and of the

soil under the sea, and to include them within the territory of the State.

This affords a legitimate explanation of the cases of foreign extra-territorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not.

But it affords no justification for, nor are they analogous to, the Alaskan Seal Statute, as is contended by the United States.

The territory of the nation extends to low-water mark; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terræ*, and, in certain exceptional cases, parts of the sea not lying *inter fauces terræ*.

The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark.

Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land.

These principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to, or on, so vast an area of the high sea as Behring Sea can be acquired. Nor has any such claim ever been made.

V.

ABSENCE OF ANALOGY BETWEEN PROTECTION OF SWIMMING ANIMALS AND OF OYSTER AND CORAL BEDS.

It is further submitted that there is no analogy between a claim to property in and to protect swimming animals, such as fish and seals, and a like claim in respect of oyster, pearl, or coral beds.

60 The exclusive fishery right recognized by international law within the territorial waters, or the waters of the dominion, cannot at any rate be placed higher than the right to take possession of wild animals which the common law gives to the owners of land on which the animals are.

If there were any land animals which by nature were attached to the soil, the common law right would be practically equivalent to a right of property; and so as to oysters and coral beds, when they are within the waters over which international law recognizes an exclusive fishery right, this right becomes equivalent to a right of property because they are attached to the soil.

But in animals which move from this area into the high sea no such property can be acquired.

VI.

NO CONSENT OF NATIONS TO PRINCIPLE OF RIGHT CLAIMED BY UNITED STATES.

Finally, it is submitted on this branch of the United States Argument, that there is not shown to be any consent of nations to any proposition which would warrant the United States claim to the right of protection or property, now for the first time advanced.

The United States endeavour further to support their contention by a reference to certain other extra-territorial laws not connected with fisheries which have been passed by other nations. They state—

United States Case, p. 237. Reference may also be made to the British Hovering Acts, the St. Helena Act of 1815, and the Quarantine Act of 1825.

The "Hovering Acts."

These Acts have been passed to prevent smuggling. They establish a practice which has hitherto been acquiesced in both by Great Britain and the United States, but they afford no analogy, either in fact or in principle, to the United States claim in the present case.

In the first place, it will be observed that the Hovering Laws do not extend the limit of territorial waters, or assert any *general* claim of dominion over an area of the sea
61 beyond the ordinary 3-mile limit, such as is asserted by the United States over the waters of Behring Sea east of a certain line. They simply claim to exercise a special jurisdiction over certain vessels at a comparatively small distance outside the usual limit, in order to prevent or punish offences against the jurisdiction *within* that limit, to which such vessels are accomplices.

And in the case of a British vessel which was seized in 1890 by a Russian cruizer, on the ground that she was seal-fishing within Russian territorial waters, Her Majesty's Government were of opinion that even if the vessel at the time of her seizure was herself outside the 3-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed licence precluded them from remonstrating against the seizure.

But no such conduct has been alleged against the British vessels seized by the United States. They were not hovering at sea, they were not lying to with intent to proceed to the territory, or the territorial waters of the United States, with intent to assist others in breaking the law there. No such grounds have ever been alleged for the seizure of the British vessels. The claim of the United States is to include the right to seize such vessels within their general jurisdiction over Behring Sea, and the analogy of the Hovering Laws cannot be adduced in support of such a claim.

Moreover, even if such analogy existed, the consent, or acquiescence, of other nations, which exists in the case of the "Hovering Acts" (so long as the jurisdiction is exercised within reasonable limits), is wanting to the claim of

jurisdiction advanced in the present case by the United States; and this absence of consent, or acquiescence, is fatal to a claim which involves the right of search and seizure on the high sea outside territorial waters, and, consequently, a violation or limitation of the freedom of the sea.

"*The St. Helena Act, 1815.*"

At the peace of 1815 it was determined by Great Britain, in conjunction with the allied Powers, that St. Helena should be the place allotted for the residence of the Emperor Napoleon Bonaparte, under such regulations as might be necessary for the perfect security of his person;
62 and it was resolved that, for this purpose, all ships whatever, British and foreign, excepting only the East India Company's ships, should be excluded from all approach to the island. Notice was accordingly given by the British Chargé d'Affaires at Washington to the United States Government on the 24th November, 1815, that a Treaty of Commerce between Great Britain and the United States, dated the 3rd July, 1815, under Article III of which liberty of touching for refreshment at the island was given to United States vessels, could not be carried out in this respect; and that the ratifications of the Treaty would be exchanged under the explicit declaration that United States vessels could not be allowed to touch at, or hold any communication whatever with, the island, so long as it should continue to be the residence of the Emperor. The Treaty was ratified on this understanding.

American State papers, vol. iv, p. 18.

The arrangement made for the general safety received the consent, express or implied, of all nations. If any analogy can be found between that case and the one now under discussion, it goes to show that the United States cannot exclude other nations from the seal fishery without a like consent.

"*The Quarantine Act, 1825.*"

This Act depends upon the principles already adverted to with regard to the Hovering Acts.

It is submitted that no one of these three Acts affords any analogy or justification for a jurisdiction based merely on protection of trade, and claimed and exercised many hundred miles in open seas.

GENERAL CONCLUSION ON THIS BRANCH OF THE CASE.

Therefore, it is submitted that the assertion that the practice of nations supports the United States contention in regard to their claim to property in, and protection of, the seals in the high sea, is without foundation.

If it is regarded as an assumption of jurisdiction on the high sea, it was entirely beyond the power of the United States Congress to pass an Act applying to foreign-
63 ers; for, without acquiescence of other nations, and without example in the practice of other nations, it infringes the rights of those nations upon the high seas.

If, on the other hand, it is regarded as part of a general jurisdiction exercised by the United States over Behring Sea, it was also beyond the power of the United States Congress to make the Act applying to foreigners; for, without the consent of other nations, and without example in the practice of other nations, it extended the territorial waters of the United States to a limit hitherto unknown and unrecognized, and in so doing it infringed the rights of other nations upon the high seas.

ANSWER TO QUESTION 5.

Therefore, it is submitted that the foregoing facts and arguments conclusively establish the answer to Question 5, raised by Article VI of the Arbitration Treaty, in favour of Great Britain, that is to say:

To Question 5.—That the United States have no right (*a*) of protection, or (*b*) of property, in the seals frequenting the islands of the United States in Behring Sea when they are found outside the ordinary 3-mile limit.

PART III.

REGULATIONS.

It is now desired to formulate, on behalf of Great Britain, the outline of the argument which will be presented in connection with the question of Regulations. As stated at p. 9 of the original Case, Great Britain has throughout been favourable to the adoption of general measures for the control of the fur-seal fishery, provided that such measures be equitable, and framed with due regard to the common interest. It is, however, essential that any Regulations should operate to preserve the fur-seal industry for the enjoyment, not of the United States alone, but of all those who may lawfully engage in sealing. In this connection, the attention of the Arbitrators is respectfully directed to the general considerations summarized at p. 159 of the British Counter-Case.

Though in the United States Case (Conclusions) it is maintained that Regulations must practically be such as to prevent pelagic sealing everywhere, it is also stated that the United States are in the position of *trustees* of the sealing interest, thus involving the idea of other rights besides those of the United States. United States Case, p. 300.

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The United States further, in their conclusions to their Case, include in the second "Material question" to be determined by Arbitrators:

> Whether the United States and Great Britain ought not in justice to each other, in sound policy for the common interest of mankind, &c., "to enter into such reasonable arrangement by concurrent regulations or convention, in which the participation of other Governments may be properly invited," &c. Ibid., p. 299.

In the Counter-Case of the United States, however, a more advanced position is taken. We read:

> The United States insist, as claimed in their Case, that they have, upon the facts established by the evidence, such a property and interest in the seal herd frequenting the Islands of the United States in Bering Sea, and in the industry there maintained arising out of it, as entitles them to protection and to be protected by the Award of this Tribunal *against all pelagic sealing, which is the subject of controversy in this Case*, and quite irrespective of any right of property or of self-defence in respect of their territorial interests, they claim to have clearly shown that no regulations short of prohibition will be sufficient to prevent the early destruction of the Alaskan seal herd. United States Counter-Case, p. 121.

Before considering the scope of the Regulations, the question as to the area of waters over which they should extend requires notice. It appears from certain passages in the United States Case and Counter-Case, that it will United States Case, pp. 301–303.

be contended on behalf of the United States that the Regulations should amount to a practical prohibition of pelagic sealing in all waters to which seals from the Pribyloff Islands resort, and should effectually prohibit and prevent the capture, anywhere upon the high seas, of any seals from the Pribyloff Islands.

Counter-Case, p. 121.

It is submitted that any such contention is entirely beyond any claim ever advanced by the United States at any stage of the controversy prior to the delivery of their Case, and is contrary to the agreement of the parties which was embodied in the Treaty. That Treaty deals, and deals only, with "questions which have arisen" between the two Governments. In no part of the discussion was it suggested that the rights of the United States to limit the killing of seals extended beyond Behring Sea. On the contrary, when the British Government desired the assent of Russia to the *modus vivendi* proposed in the month of June 1891, it was pointed out by Mr. Wharton, in a despatch to Sir Julian Pauncefote, dated the 4th of that month, that the contention between the United States and Great Britain was limited to that part of Behring Sea eastward of the line of demarcation described in the Convention with Russia of the 30th March, 1867; that Russia had never asserted any rights in the waters affecting the subject matter of the contention, and could not, therefore, be a necessary party to the negotiations if they were not expanded; and further, that the authority of the President was derived from the Statute of the United States, and that no authority was conferred upon him to prohibit or make penal the taking of seals in the waters of Behring Sea westward of the line referred to.

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United States Case, Appendix, vol. i, p. 306.

It is scarcely necessary to point out that such language not only depends for its force upon an assumed jurisdiction over an area of sea, but is wholly inconsistent with the contention that pelagic sealing in the parts of the Pacific Ocean outside Behring Sea, or in those parts of Behring Sea west of the line of demarcation, was the subject of controversy between the parties.

Ibid., p. 315.

Further, on the 11th June, 1891, Mr. Wharton, in his letter to Sir J. Pauncefote, stated that the Government of the United States, recognizing the fact that full and adequate measures for the protection of seal life should embrace the whole of Behring Sea and portions of the North Pacific Ocean, would have no hesitancy in agreeing, in connection with Her Majesty's Government, to the appointment of a Joint Commission to ascertain what permanent measures were necessary for the preservation of the seal species in the waters referred to, *such an agreement to be signed simultaneously with the Convention for arbitration, and to be without prejudice to the questions to be submitted to the Arbitrators.*

Later, viz., on the 8th March, 1892, Mr. Wharton wrote to Sir J. Pauncefote:

Ibid., p. 356.

The United States claims an exclusive right to take seals in a portion of the Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a 3-mile limit. This serious and protracted controversy, it has now been

happily agreed, shall be submitted to the determination of a
66 tribunal of arbitration, and the treaty only awaits the action of the American Senate. . . . If the contention of this Government is sustained by the Arbitrators, then any killing of seals by the Canadian sealers during this season in these waters is an injury to this Government in its *jurisdiction* and property. . . . The United States cannot be expected to suspend the defence, by such means as are within its power, of the property and *jurisdictional rights* claimed by it, pending the arbitration.

United States Case, Appendix, vol. i, p. 359.

And on the 22nd March, 1892, he again writes:

For it must not be forgotten, that if Her Majesty's Government proceeds during this sealing season upon the basis of its contention as to the rights of the Canadian sealers, no choice is left to this Government but to proceed upon the basis of its confident contention, that *pelagic sealing in the Behring Sea is an infraction of its jurisdiction* and property rights.

Ibid., p. 361.

There is no known method whereby the seals resorting to Behring Sea may be distinguished, at any rate before capture. Upon no construction of the Treaty could it be pretended that the Tribunal of Arbitration is empowered to regulate the pursuit of seals generally. To prohibit the pursuit of certain specified fur-seals outside of Behring Sea, or to make Regulations concerning them, would be impracticable, and it is submitted would be beyond the authority given to this Tribunal.

Passing from the question of the area of waters over which the proposed Regulations should extend, and assuming the Regulations to apply to the whole, or some part of, the non-territorial waters of Behring Sea, the contention of the United States, so far as it can be gathered from their Case, is that pelagic sealing must be entirely prohibited.

It is submitted that any decision of the Tribunal prohibiting pelagic sealing would be contrary to the terms of the Treaty.

Article VII contemplated the establishment of Regulations as applicable to the pursuit of seals outside territorial waters; and the prohibition of pelagic sealing is not authorized.

To contend that pelagic sealing should be entirely prohibited would be, under cover of so-called Regulations, to defeat the manifest intention of the parties.

The following argument is, therefore, based upon the view that the Regulations should be such as should be fair,
both to the United States as owners of the Pribyloff
67 Islands, and to Great Britain as representing those who desire to engage in the lawful industry of pelagic sealing, but who at the same time are willing to be bound by such Regulations as are necessary for proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea.

Furthermore, it is essential that the Regulations should be such as would be likely to secure the adhesion of other Powers, and would not operate as an inducement to them to withhold their consent with the knowledge that by so doing they would secure to themselves greater advantages from the industry in question.

As appears from the British Counter-Case, and from the Report of the British Commissioners, the main provisions which might be properly embraced by Regulations are the maintenance of a zone of protected waters round the breeding-islands, the establishment of a close season, and restriction as to the date in each year when sealing-vessels should enter Behring Sea.

Having regard to the fact that each of these proposals, when taken separately, is treated in the United States Case and Counter-Case as being of no value, and that the proposals collectively appear to be considered as wholly insufficient, the way in which the question has been dealt with by the United States in the correspondence prior to the Treaty of Arbitration is worthy of consideration.

Up to the month of December 1890, suggestions of a more or less general character appear from time to time in the correspondence to the effect that international Regulations should be established through the medium of a Convention, to which all nations interested should be parties. These suggestions led to no definite agreement, and were succeeded by a proposal contained in the following passage from a note of Mr. Blaine to Sir Julian Pauncefote, under date the 17th December, 1890:

United States Case, Appendix, vol. i, p. 284.

The President will ask the Government of Great Britain to agree to the distance of 20 marine leagues within which no ship shall hover round the islands of St. Paul and St. George from the 15th May to the 15th October of each year. This will prove an effective mode of preserving the seal fisheries for the use of the civilized world.

And in the same despatch there was formulated a question, in the following words, on which the VIIth Article of the Treaty of Arbitration was founded:

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United States Case, Appendix, vol. i, p. 286.

Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States, and feeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal-fishing industry, so valuable and important to mankind, from deterioration or destruction. And, if so, third, what months or parts of months should be included in such season, and over what waters it should extend.

To this proposal of Mr. Blaine's Lord Salisbury replied in his despatch of the 21st February, 1891, in which, dealing with the sixth question, he observed:

Ibid., p. 294.

The sixth question, which deals with the issues that will arise in case the controversy should be decided in favour of Great Britain, would perhaps more fitly form the substance of a separate reference. Her Majesty's Government have no objection to refer the general question of a close time to arbitration, or to ascertain by that means how far the enactment of such a provision is necessary for the preservation of the seal species; but any such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States.

Ibid., p. 319.

Finally, in deference to the objection thus taken by Lord Salisbury, Mr. Wharton, in a letter of the 25th June, 1892, to Sir Julian Pauncefote, proposed what now forms Article VII of the Treaty.

It is therefore to be noted that the original proposition, emanating from the President of the United States, viz., that the establishment of a protective zone, within which the killing of seals should be prohibited between certain specified dates, was suggested as being an effective mode of preserving the seal fisheries for the use of the civilized world, and it is contended, on behalf of the British Government, that further investigation and examination of the facts fully justify the view that Regulations of this character, but establishing a zone of smaller area, would suffice so far as pelagic sealing is concerned.

69 Even assuming a point which is open to considerable doubt, viz., that some of the seals still suckling their young travel to parts of Behring Sea at considerable distances from the Pribyloff Islands, by far the greater majority, if not the whole, of such female seals will be found within a zone of more moderate area.

It is established that the seals, whatever may be the cause of their leaving the islands, do not habitually or regularly go in search of food. Food, ample for their wants, is to be found in the vicinity of the islands, but all the best information points to the fact that they do not feed during the main period of their sojourn on land. In addition, the prohibition of the killing of seals during July and August, within the protected zone, would insure that the vast majority, if not all, of the female seals actually suckling their young, would be free from capture by pelagic sealing during such time as the pups are dependent upon them.

It is unnecessary to discuss in detail the minor Regulations which have been suggested as to the means of pelagic capture, and as to the due authentication of all licensed sealing vessels. These are matters on which lengthened argument would be out of place here.

It is, however, obvious that the adoption of such Regulations, and the enforcement of legislation in order to render them effective, does involve the curtailment of rights which, upon the hypothesis which forms the basis of this argument, now belong to other nationals, including British subjects.

The object of any Regulations is the proper protection and preservation of the fur-seal in, or habitually resorting to Behring Sea. It would be unjust that other nations should be asked to enforce by legislation this curtailment of the rights of their nationals, without some corresponding concession on the part of the United States, as owners of the islands and the territorial waters thereof.

That during a great portion of the year the seals are feeding upon fish which are valuable for the food of man upon the coasts of the territory of Great Britain, and other nations, cannot be denied.

That during other portions of the year they are
70 consuming fish that are swimming in the high seas, in which all nations have an interest, is conceded.

It would not be equitable that restrictions upon the rights of other nations should be demanded solely for the purpose of enhancing the benefit to be derived by the United States from their possession of the islands. The least that can be suggested is that, concurrently with the establishment of such Regulations as are applicable to pelagic sealing, and in order to induce other nations, who are not parties to this Arbitration, to concur in, and give effect to, any Regulations, a reasonable limit to the slaughter of seals on the breeding-islands and proper provisions for its conduct should be made by the United States.

The Regulations for the islands which the United States may be willing to make must, it is submitted, have an important effect upon the judgment of the Arbitrators as to what pelagic Regulations would be reasonable or necessary, and it is further submitted that it is within the competence of this Tribunal to make the latter Regulations dependent or conditional on the former.

To apply restrictions to pelagic sealing, without effective and concurrent Regulations being enforced on the breeding haunts, would be as unreasonable and useless as the institution of restrictions over a coastal or estuary salmon fishery, while the salmon on the spawning-beds of the river were being taken without let or hindrance.

It is contended on behalf of the United States that the management of the islands in the past had been properly controlled and conducted with due regard to the protection of seal life. Her Majesty's Government are unable to concur in that view. For reasons that have been stated at length in the Counter-Case, in reply to the contentions in the United States Case, it is submitted that the excessive killing of seals on the islands during a long series of years has contributed largely to, and has been in all probability the main cause of diminution in numbers. Be this as it may, in view of the experience of the past, the number of seals to be killed in each year upon the Pribyloff Islands ought to be limited, and the methods pursued there controlled, in accordance with the actual condition of seal life, and subject to periodical review by independent Government Agents.

71 Finally, it is submitted for the consideration of the Tribunal that the imperfect knowledge even now possessed as to the habits and conditions of seal life in many essential particulars makes it important to consider how far it is safe to lay down Regulations unlimited in duration until wider experience of their operation has been acquired.

PART IV.

DAMAGES AND COMPENSATION.

1. British Claim for Damages.

There remain for consideration the questions of fact which are involved in the claims made by the owners of British vessels for injuries sustained by the seizure of their vessels, and by such vessels being prevented by the action of the United States cruizers from engaging in pelagic sealing in Behring Sea. The British Government agree with the Government of the United States that, as far as damages are concerned, no question of amount is to be discussed before the Tribunal of Arbitration, and that only questions of fact involved in the claim are proper for consideration. It is admitted in the Counter-Case on behalf of the United States that the seizures and acts of interference complained of took place outside the ordinary territorial waters of the United States, that is to say, outside the 3-mile limit; and, further, that the acts of seizure and interference were authorized and executed under and by the authority of the United States Government, for the purpose of enforcing certain laws passed by the United States.

Article VIII, Treaty of Arbitration.

United States Counter-Case, p. 129.

Ibid., p. 130.

Under these circumstances, assuming, as is necessary for the purpose of the question now under discussion, that the claim on behalf of the Government of the United States to interfere with the ships of other nations fishing in the non-territorial waters of Behring Sea is unfounded, the responsible Government of the United States have by force prevented the vessels in question, and their owners, masters, and crew, from engaging in a lawful occupation and industry.

72 The contention put forward at p. 133 of the United States Counter-Case is, that all the items of claim there referred to, that is, "Loss of estimated Catch," "Probable Catch," "Balance of probable Catch," "Reasonable Earnings for the months of October, November, and December," and "Loss of Profits," are in the nature of prospective profits or speculative damages, and are so uncertain as to form no legal or equitable basis for finding facts upon which damages can be predicated.

This view of the law has been rejected by the English Courts. In Phillips *v.* the London and South-Western Railway Company, where an eminent medical practitioner who had been injured by the negligence of a Railway Com-

5 C. P. D. 280.

pany was awarded 16,000*l.* damages, the Court of Appeal held that the jury had been rightly directed to take into account the loss of his professional income of 5,000*l.* a-year. And in the "Argentine," the House of Lords held that in awarding damages to a ship which had come in collision with another, the fact that the ship could not be repaired in time to fulfil a contract for another voyage, and had lost earnings in consequence, had been properly taken into account. Lord Herschell said:

14 App. Cas. 519.

> The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision.

He then proceeded to explain, what it is not necessary here to consider, that the damages were not limited to the time of actual non-repair, but that account might be taken of the loss of a voyage previously contracted for, setting off against such loss what the ship could have earned by other means, after completion of the repairs, during the time which such voyage would have occupied.

After due regard has been paid to all considerations, such as the nature of the season, the size and equipment of the vessels, and the amount of the catch in previous seasons, an estimate can be formed of the probable catch of each vessel during the season in which their operations were prevented or interfered with.

The loss of catch is due directly to the action of
73 the United States Government, and the fact that the earnings or profits were prospective in no way affects the right of the claimants to recover.

The refusal of the Geneva Arbitrators to award damages to the United States for the loss of "prospective earnings" must be understood with reference to the actual conditions of the case before them. The ships in respect of which the claim was made had been destroyed. Chief Justice Cockburn, who here was in agreement with the rest of the Tribunal, says in his reasons:

"North America No. 2 (1873)," Part II, p. 253.

> According to the decisions of the Supreme Court of the United States, the only allowance which ought to be made in respect of prospective catch is in the nature of interest from the time of the destruction of the vessel.

The distinction is between prospective earnings from a ship destroyed, and temporary interruption in the employment of an existing ship.

With regard to the allegations which are brought forward at pp. 130 to 133 of the United States Counter-Case, that is to say, that certain citizens of the United States were interested, as mortgagees or otherwise, in some of the vessels in question, Her Majesty's Government do not admit either the truth of the allegations, or that they are proper for consideration.

By 17 & 18 Vict., cap. 104, sec. 70, it is enacted as follows:

> A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagee be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

The Tribunal will be asked to find that the several heads or items of damage claimed are correct, saving all questions of amount and liability.

2. British Claim for Compensation.

By Article V of the *modus vivendi* of 1892 it is expressly agreed that, if the result of the arbitration shall be to affirm the right of British sealers to take seals in Behring Sea within the bounds claimed by the United States, under its purchase from Russia, then compensation
74 shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during the pendency of the arbitration, upon the basis of such regulated and limited catch or catches as, in the opinion of the Arbitrators, might have been taken without an undue diminution of the seal herds. The Article further provides that the amount awarded shall be just and equitable, and shall be promptly paid.

Great Britain is entitled, under this Article, to the award of a just and equitable sum by way of compensation, to be ascertained by the Arbitrators on the above basis.

3. United States Claim for Damages.

In the event of its being decided that British sealers have no right to take seals within the waters of Behring Sea, it will be contended by Her Majesty's Government that the basis upon which the amount of the United States claims is assessed in the Case of the United States is untenable.

The whole of what is called in the United States Case "the claim of the Government," as distinguished from "the claim of the lessees," is founded on the prohibition of sealing on the islands imposed under the *modus vivendi* of 1891. But no claim can be made in respect of the consequences of fulfilling a contract voluntarily entered into, unless by reason of some contract provision, such as is contained in the *modus vivendi* of 1892, but not in that of 1891. Her Majesty's Government made it a condition of renewing the *modus vivendi* in 1892, that "the Arbitrators should, in the event of a decision adverse to the United States, assess the damages which the prohibition of sealing" should have caused. No such stipulation had been made by either Government in 1891.

United States Case, p. 287.

Ibid., Appendix, vol. i, p. 363.

4. United States Claim for Compensation.

By Article V of the *modus vivendi* of 1892, if the result of the arbitration should be to deny the right of British sealers to take seals within the specified waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens, and lessees) for the
75 Agreement to limit the island catch to 7,500 a season, upon the basis of the difference between this number and such larger catch as in the opinion of the Arbitrators might have been taken without an undue diminution of "the seal herds."

In fixing the "larger catch" mentioned in this Article, the following facts require consideration:

British Case, Appendix, vol. iii, No. 2, 1891, pp. 1, 3.

The *modus vivendi* of 1891 was originally assented to by Great Britain because it was asserted on the part of the United States that the diminution of seals had become so great as to require some such immediate and drastic provision to prevent extermination.

Senate, 51st Cong., 2nd Sess., Ex. Doc. No. 49, pp. 11, 12.

During the sealing season of 1890, on the Pribyloff Islands, Mr. Goff, the Government Agent, stopped the killing of seals when only 21,857 had been killed, alleging that this was absolutely necessary because of the paucity

Ibid., p. 13.

of seals of suitable age for killing. The agent of the North American Commercial Company thereupon lodged a protest against the curtailment of the Company's privilege of killing.

Ibid., pp. 6 and 9.

In reporting on the sealing season of 1890, Mr. Goff, the Government Agent on the islands, and Mr. Lavender, Assistant Agent, both advised the cessation of all killing

British Case, Appendix, vol. iii. "United States No. 2, (1891)," pp. 17, 21, 60.

for skins upon the islands for several years. Mr. Elliott, in his letter to Secretary Windom, summarizing and transmitting a detailed Report made in pursuance of a Special Act of Congress, makes a recommendation to the same effect, placing the period of abstention from killing at seven years at least.

Sir J. Pauncefote to Mr. Blaine, February 29, 1892. Marquis of Salisbury to Sir J. Pauncefote, March 18, 1892.

The result of the investigation of seal life made by the British Commissioners in 1891 was, however, such as to convince Her Majesty's Government that the very stringent measures of the *modus vivendi* of 1891 need not, in the interests of the sealing industries, be repeated in 1892.

British Case, Appendix, vol. iii. "United States No. 3 (1892)," pp. 155 and 159. Sir J. Pauncefote to Mr. Blaine, February 29, 1892.

Consequently, when a new *modus vivendi* was pressed for by the United States, it was proposed by Her Majesty's Government that a zone of protection, not exceeding 30 miles, should be extended about the Pribyloff Islands, while the killing upon these islands should be restricted to a *maximum* number of 30,000.

British Case. Appendix, vol. iii. "United States No. 3 (1892)," p. 161.

The United States, however, promptly and decisively pronounced this proposal for a *modus vivendi* in 1892, to be, from their point of view, "so obviously inadequate,

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and so impossible of execution, that this Government cannot entertain it."

Acting Secretary Wharton to Sir J. Pauncefote, March 8, 1892.

The British Government eventually consented to the establishment of a new *modus vivendi*, generally similar to that of 1891, but with the condition as to compensation above mentioned.

It is submitted that, in fixing the dimensions of the catch which might have been made upon the Pribyloff Islands, for the purposes of compensation, the United States cannot

United States Case, p. 291.

now rely, as they seek to do, on the data which they explicitly contradicted in the spring of 1892.

No. 1.

Criticism of Part Second of the Counter-Case of the United States, which is entitled, "Reply of the United States to that portion of the Case of Great Britain contained in the Report of the British Commissioners."

It is observed with regret, that throughout the second portion of the Counter-Case of the United States, reflections on the impartiality, competence, and even on the honesty of the British Commissioners are repeatedly made. It is, for instance, many times asserted that the British Commissioners endeavour to support various preconceived opinions or "positions" by evidence selected for the purpose. But a reference to the Commissioners' Report will show that no such course was adopted, and that various points upon which the available evidence was found to be inconclusive have been so characterized by them.

It is only necessary to draw attention to the fact, that at a date as late as November 1890, the Canadian Government, relying on evidence contained in official Reports of the United States Government, denied any decrease in the seals met with upon the Pribyloff Islands; while one of the main conclusions of the Commissioners proved to be in direct opposition to this contention, and was to the effect that a nearly continuous decrease had occurred during the entire period of the control of these islands by the United States.

There is surely nothing remarkable in the circumstance that some of the conclusions arrived at by the British Commissioners should agree with previously advanced contentions of the British and Canadian Governments. It might, on the other hand, be characterized as remarkable,

78 that for the purposes of the present submission to arbitration the United States Government have discarded their own previous official Reports, and have substituted a number of statements and affidavits procured after the conclusion of the Treaty, upon which to base their contention; the evidence contained in latter being often at variance with the previous and contemporaneous Reports thus discarded. Though a special Act of Congress was passed to authorize an investigation of the sealing industry on the Pribyloff Islands in 1890, and such investigation was carried out, it is at least worthy of note that the Report detailing the result of this investigation has not

51st Cong., 2nd Sess., H. R. 7903.

been employed in connection with the Case or Counter-Case of the United States; that this Report has not been published by that Government; and that the United States have even refused to furnish this Report to the Agent for Great Britain, who had formally applied for it.

It is thus apparent, not only that the United States (as elsewhere shown) have gradually changed their position in regard to rights in Behring Sea, but that they have now almost entirely ignored the previous Reports and assertions of their own official Representatives in respect to the facts bearing upon seal life and its conditions.

Without attaching undue importance to the attack made in the Counter-Case of the United States upon the integrity of the British Commissioners, it is proposed to show, in this Appendix, that, without important exception, the conclusions arrived at by the British Commissioners, during their investigations in 1891, stand unaffected by the arguments directed against them in the Counter-Case of the United States; that these arguments, both in fact and form, are unfounded and erroneous; and that, generally, the conclusions of the Commissioners have been substantiated by further inquiries and investigations conducted in 1892.

The subjoined notes take the form of brief critical statements directed to the various assertions made in the part of the Counter-Case of the the United States to which it relates, and follow the arrangement and order in which these assertions are presented in it.

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79 [The marginal references to pages, unless otherwise specially designated, are throughout to the pages of the United States Counter-Case.]

"FIRST."

"MATTERS IN RELATION TO WHICH THE REPORT AND THE CASE OF THE UNITED STATES MATERIALLY CONFLICT, AND CONCERNING WHICH PROPOSITIONS OR FACTS ARE ALLEGED IN THE REPORT WHICH HAVE NOT BEEN CONSIDERED IN THE CASE OF THE UNITED STATES."

"HABITS OF THE FUR SEALS."

"1. *Distribution of Seals in Behring Sea and the suggested Intermingling of the Pribyloff and Commander Seal Herds.*"

Pages 48, 49. This chapter commences by quoting and alluding to certain passages from the British Commissioners' Report, which convey only one side of the discussion of facts of which they form a part. The general conclusion reached by the British Commissioners as the result of the whole discussion are not quoted.

Pages 49, 50. The Maps relating to the distribution of seals (particularly Nos. 3 and 4), presented by the British Commissioners, are then noticed by the United States, and it is contended

that they are incorrect and not justified by the evidence adduced in support of them, particularly in the matter of the general distribution of seals in Behring Sea during the summer months.

It is stated by the United States that the Maps must have been based chiefly upon the logs of the various men-of-war, that the information contained in these logs is insufficient to bear out the indications of the Maps, and that, as other evidence relied upon by the British Commissioners is not particularly specified or detailed, it "should have no influence on the Tribunal."

It is then assumed that the only data were those derived from the logs of cruizers, and those of the British cruizers are reproduced in the form of Charts appended to the United States Counter-Case, together with the tracks of United States cruizers in 1892. Pages 50, 51.

In reply to these contentions, it may be stated that the distribution of seals in Behring Sea in 1891, as shown on the British Commissioners' Maps, in so far as it relates to the part of Behring Sea surrounding the Pribyloff Islands, depended chiefly upon the logs of the several cruizers, but an inspection of the tracks, as printed by the United States, will show that the cruizers in most cases confined their operations to the regions surrounding the Pribyloff Islands.

For other parts of the sea, other sources of information had to be employed. The British Commissioners refer to those other sources (including their own voyages) in a general way. The details and the names of informants were not specifically given, merely in order to curtail the length of their Report. The procedure followed in this case resembled that adopted in most other cases by both the British and United States Commissioners. See *post*, p. 106.

Information obtained in 1892, and set forth in detail in the British Counter-Case, however, not only fully confirms the statements made by the British Commissioners as to the intermingling of fur-seals in Behring Sea, and as to their distribution in that sea; but are also such as to supply to the United States the precise data which they appear to require. British Counter-Case, pp. 119–140; and Appendix, vol. ii, pp. 23–27.

"2. *The alleged promiscuous nursing of Pups by Female Seals.*"

On this subject, the United States deny that certain evidence, tending to show that female seals nurse other pups than their own, is "sufficient to establish the facts alleged." But the British Commissioners in their Report make no definite allegation in this connection. The actual evidence on both sides is given by the Commissioners, and is discussed by them. Page 53.

It is next stated, that though Messrs. Elliott and Bryant are "the two most prominent authorities relied on" in the British Commissioners' Report, the opinions of these observers are not accepted on the question here under discussion.

Bryant and Elliott are often quoted as authorities, because their observations are those which enter most fully into

subjects connected with seal life, and have been fully published in United States official Reports. Where actual *observations* are stated, doubt is seldom, if ever, cast on them; but when deductions are drawn from observations, it is quite fair to criticize these, even where the observer may be perfectly unprejudiced. The data quoted by Bryant and Elliott on the question of the suckling of pups, leave their conclusion evidently in the position of a not-proven deduction or theory.

British Commissioners' Report, paras. 321, 322.

Page 53.

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The further complaint in the United States Counter-Case, that the British Commissioners quote Elliott as to the want of affection of female seals for their young, while they do not quote remarks contained in a publication by Sir F. McCoy, is pointless. The British Commissioners quote Elliott, because his observations agree with those made by themselves on the Pribyloff Islands. They state as much.

Page 55.

In the British Commissioners' Report, Mr. C. H. Jackson, Government Agent in charge of the Seal and Guano Islands of Cape Colony, is quoted as making a definite assertion, to the effect that in that region—

> the cow [seal] will suckle any of the young seals, whether her own or not.

Mr. Jackson is consequently designated in the United States Counter-Case as a "questionable authority," and it is added that—

> an examination of the Report of this gentleman fails to reveal upon what knowledge he bases such a statement; and there is no proof that he has ever seen the seal islands of Cape Colony, or even been informed by experienced individuals respecting the habits of the fur-seals found there.

It is then insisted that his evidence is unworthy of consideration. Mr. Jackson, however, actually says in his Report:

British Commissioners' Report, Appendix, p. 155.

> I have availed myself of information kindly furnished by the best practical experts in the Colony.

Pages 56, 57.

An attempt is here made in the United States Counter-Case, to show that the British Commissioners attributed a statement on the same subject to Sir F. McCoy, which was not made by him. A reference to the Report will show that the British Commissioners merely allude to the statement and cite a work by Sir F. McCoy, in which it is contained. It is not implied that the statement was made by Sir F. McCoy personally, but the fact that he included it in his work may probably be assumed as showing that he believed in its inherent credibility.

British Commissioners' Report, para. 321.

Page 56.

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It is also asserted, in concluding this subject, that the position taken by the United States, *i. e.*, that a female seal will suckle no pup but her own, is supported by "ample evidence." This evidence is referred to in a foot-note.

United States Counter-Case, Appendix, p. 366.

Mr. Grebnitsky is among the authorities thus quoted, but the remark made by him is only incidental, and he advances no proof. So also with the evidence in the Appendix to the United States Case which is here referred

to. This consists either of mere assertion, or, when proof is endeavoured to be advanced, it is quite inconclusive in character.

Observations in 1892 show that young seals do at least occasionally obtain milk from other mothers than their own. British Counter-Case, Appendix, vol. i, p. 143.

"3. *Period at which the Female Seals go into the Water.*"

In regard to this subject, as in the case of the last, it will be found that the Report of the British Commissioners makes no definite "assertion," though it is represented as so doing in the Counter-Case of the United States; where it is also stated that the Report "practically adopts the opinion of Snegiloff, the native foreman on the Russian Islands," though this is likewise not apparent in the Report itself. In the Report it will, in fact, be found that all the evidence available, together with the personal observations of the Commissioners, has been collected and discussed impartially. Pages 57, 58.

The general conclusion arrived at by the British Commissioners is to the effect that the female seals remain some time on land after giving birth; that when they begin to return to the sea they do not at once resume their feeding habits, but resort to the waters close to the shores, and that probably about the middle of September, they may again begin to spend a considerable portion of their time at sea in search of food.

It is because these conclusions, and the evidence supporting them, are found to be adverse to a new position since taken in the Case of the United States, that it appears to be considered necessary to commit the British Commissioners to some "assertion" which may effectively be attacked.

83 The evidence obtained from the natives of the Pribyloff and Commander Islands is rejected by the United States because the names of the Commissioners' informants are not detailed, a point dealt with elsewhere. Pages 57, 58. *Post*, p. 106.

Information regarding the feeding habits of seals obtained from Her Majesty's Minister at Tôkiô is rejected, and stated to be "based on no actual knowledge," though he specially states that the notes prepared by him were "based on an experienced authority." British Commissioners' Report, Appendix, p. 107.

The published statements of Capt. Bryant as to the period during which the females remain on shore after giving birth are next attacked, and it is endeavoured to show that discrepancies occur in his Report; while the fact that the same author (a Government official) does not repeat the statement of the actual period during which the females remain ashore after giving birth, in a later communication addressed to Professor Allen, is said to show that— Pages 58, 59.

Captain Bryant had *publicly discarded* the opinion used by the Commissioners to *maintain their position*.

And, as evidence of this, references are given to two statements made to Professor Allen, in neither of which does Captain Bryant say anything at variance with what is

quoted by the British Commissioners. He does, indeed, state that—

"Monograph of North American Pinnipeds," p. 386.

> the females, after giving birth to their young, temporarily repair again to the water.

But not for the purpose of feeding, for in the same paragraph he says that, after impregnation—

> she lies either sleeping near her young, or spends her time floating or playing in the water near the shore, returning occasionally to suckle her pup.

In the statement next referred to, only a part of what Captain Bryant wrote is quoted. He begins the sentence, thus partially given, by saying—

Ibid., p. 382.

> As you have had the result of my first season's observations there [see Bull. Mus. Comp. Zool., vol. ii, 1870, pp. 89–108], I need not be so diffuse in my descriptions as would be otherwise necessary, and you will understand, &c.

And it is from the Report thus referred to that the Commissioners quote.

Pages 58, 59.

84 It will be remembered that certain recent affidavits made by Captain Bryant in 1892 are prominently advanced as evidence by the United States.

United States Case, Appendix, vol. ii, p. 3.

United States Counter-Case, Appendix, p. 413.

Having, in the manner above outlined, treated the evidence, observations, and general conclusions of the British Commissioners on this subject, the United States Counter-Case concludes the discussion by the following unwarranted statement:

> One native of the Commander Islands is, therefore, the sole authority for the statement of the British Commissioners.

The method of treatment thus adopted on the part of the United States, for the purpose of combating a reasoned discussion on natural facts, is resorted to in many other instances in their Counter-Case. But it is impossible to treat all these in any detail here. The attention of the Arbitrators is therefore respectfully called to a comparison of paras. 303–316 of the British Commissioners' Report, with their criticism as contained on pp. 57–60 of the Counter-Case of the United States.

Post, p. 125.

In conclusion, the United States refer to evidence obtained in 1892 by Mr. C. H. Townsend, which is elsewhere discussed, and to observations of Mr. Stanley-Brown. It may here be mentioned, however, that Mr. Townsend's observations as to the condition of the rookeries in regard to the number of females ashore at a certain date in 1892, does not show that the observations of the British Commissioners at the same date in 1891 were erroneous. Neither is Mr. Stanley-Brown's statement, that the females stay on land *fourteen to seventeen* days after the birth of the young, in conflict with any statement made by the British Commissioners; but the assumption must not be made that when the females begin to seek the water this is equivalent to their going to sea in search of food.

British Commissioners' Report, paras. 306, 308, 309, 313.

"4. *Aquatic Coition.*"

Pages, 60, 61.

Evidence quoted by the British Commissioners from published Reports of the United States, on the authority

of Captain Bryant and Dr. W. H. Dall, on the subject of aquatic coition, are next combated by drawing attention to depositions made in 1892, in which these witnesses deny or endeavour to minimize the force of their previous statements. Captain Bryant is as definite in his former Reports respecting the occurrence of coition at sea and its frequency as it is possible for language to be. He repeats these statements in three separate Reports, dating from 1869 to 1880, to which references are given in detail in the Report of the British Commissioners. He says, for instance:

Pages 60, 61.

85

See British Commissioners' Report, pp. 52, 53.

By taking a canoe and going a little off shore considerable numbers may be seen pairing, and readily approached so near as to be fully observed.

"Monograph of North American Pinnipeds," pp. 405, 406.

Dr. Dall is almost equally precise, writing—

They [the females] sleep in the water, lying on their sides, with the two flippers [of the upper side] out of the water, and receive the males in the same position.

Bull. Mus. Comp. Zool., vol. ii, No. i, p. 100. See also "Alaska and its Resources," p. 494.

If these gentlemen have been in the wrong in regard to opinions thus stated in scientific treatises, which are now denied in affidavits lately obtained from them, can it be assumed that the statements made in these affidavits are correct?

On these pages of the United States Counter-Case, various arguments are advanced for the purpose of endeavouring to show that coition at sea cannot occur. These can be shown in detail to be erroneous, and to be based on misconceptions or on facts imperfectly stated; but as further and wholly conclusive evidence, obtained since the completion of the Report of the British Commissioners, is available in the British Counter-Case to prove that coition at sea is often observed, it is not considered useful to follow further the hypothetical statements and attempts at destructive criticism of that Report, which are resorted to on the part of the United States.

Pages 63, 64.

British Counter-Case, Appendices.

Page 63.

British Counter-Case, Appendix, vol. i, pp. 139, 140.

Ibid., vol. i, pp. 125, 126.

Ibid, vol. ii, pp. 33, 34.

"MANAGEMENT OF THE PRIBYLOFF ISLANDS AS THE ALLEGED CAUSE OF THE DECREASE OF THE ALASKAN SEAL HERD."

It is here stated in the United States Counter-Case that—

Page 65.

the British Commissioners, at several places in their Report, admit that the Regulations in force, and the methods employed in taking seals on the Pribyloff Islands, are the best that could have been adopted, &c.

86 It is then argued that, as the methods were good, it is only to the manner of the execution that the criticisms of the British Commissioners apply; and on the further assumption, that both were perfect during the Russian régime, that the increased annual killing of seals during the United States control is the only remaining point of criticism to be met by the United States.

Page 65.

But this apparently simple method of reducing the points in dispute to a single item does not, in fact, accord with the statements made in the Report of the British Commissioners. The Report does not, as here stated by

British Commissioners' Report, paras. 660–662, 46.

the United States, affirm the excellence of the principles of management without qualification.

Without, however, in this place entering into a general discussion of this matter, it is proposed to follow the special and limited line of criticism adopted on the part of the United States.

The United States then proceed to *insist* that attention as to any decrease of seals should be confined to the *first decade* of the lease of the Alaska Commercial Company before pelagic sealing became important, because the British Commissioners admit that in later years there were concurrent causes tending toward decrease. The argument would, however, invalidate all the United States arguments directed against pelagic sealing, and the conclusions in respect to such sealing at which they arrive.

United States Case, pp. 172–174.

Moreover, the United States in their Case have held that in these recent years the decrease was observed in *females* only, and that these have been killed at sea. They have endeavoured to prove this at length, and cannot now complain if evidence showing the decrease in the number of males is adduced on the same subject for the same period, *i. e.*, the second decade of the Alaska Commercial Company's lease.

Page 66.

It is here, however, admitted by the United States that, under certain conditions, matters relating to the islands, even after pelagic sealing became important, may be relevant to the discussion. The conditions are stated to be:

> That there was a sufficient increase in the number of seals killed on the islands, or sufficient changes in the methods employed in taking the quota, to materially affect and deplete the seal herd, even without the introduction of pelagic sealing.

Page 66.

87 They then admit that some time after pelagic sealing began—

> the number *allowed by the lease* to be killed was more than the reduced herd could properly endure; but they assert that *any evil effects resulting from the management of the islands* is directly chargeable to the conditions established by pelagic sealing.

United States Case, p. 153.

This remarkable admission stands broadly in contradiction to the statement elsewhere made, that—

> this number is variable and entirely within the control of the Treasury Department of the United States.

In other words, the preservation of the seals as a whole was not the object of the management of the islands, the ruling factor being the annual take of a large number of seals, whatever the effect.

But passing over for the moment these aspects of the case, it may be pointed out that the British Commissioners in their Report practically comply with the conditions insisted on by the United States. They, in fact, show that the methods as well as the actual number of seals taken on the islands were such as to be injurious to seal life as a whole. Their treatment of the whole subject of the management of the Pribyloff Islands is practically directed to these points.

It is next stated by the United States that not till 1889 did the—

decrease in the birth-rate of the seal herd . . . . become sufficiently evident among the male portion of the herd to seriously attract the notice of, and alarm, the Government Agents on the islands.

It is, of course, impossible to say what precise amount of decrease would be such as to "attract the notice" of a Government Agent, or whether these Agents were more easily "alarmed" in this respect in the last year of the lease of the Alaska Commercial Company than they had been formerly. The Company was in fact about to make a new tender for a second lease of the islands. It is unnecessary to inquire into this subject too minutely, for the United States have in their Case adduced evidence, and asserted on the authority of that evidence, that the decrease of seals became perceptible as early as 1884; while the British Commissioners have conclusively shown that the decrease was almost continuous from the earlier years of the United States control of the islands, and had become such as to be seriously felt, at least as early as 1879.

Ibid., pp. 165, 166.

British Commissioner's Report, paras. 57,58.

88

Page 66.

It is here stated by the United States that in 1889—

Page 67.

for the first time the weight of skins fell below the average for former years.

If, by this statement, it is meant merely to affirm that the weight (this being equivalent to the size) of skins was lower than the general average weight of the preceding nineteen years, it is correct; but if it is intended to mean that this was the first year in which the weight of skins was lower than in preceding years considered separately, it is untrue. Evidence quoted in the British Commissioners' Report shows conclusively that the decreasing weight of skins was fully acknowledged on the islands at least as early as 1883, and evidence since obtained, and given in the British Counter-Case, shows that smaller and smaller skins were almost each year taken since 1873.

British Commissioners' Report, para. 696.

British Counter-Case, p. 257; and Table facing that page.

It is here stated, that notwithstanding the reduced number of seals taken in 1890 and in 1891 (under the *modus vivendi* of that year)—

the herd continued to become more and more depleted, and in 1892 a decrease appears over 1891, though the consensus of opinion of those on the islands is, that in the last year the male seals have increased to a limited extent.

These remarks are doubtless intended to apply to seals seen upon the Pribyloff Islands only, and do not take into account observations on abundance of seals made at sea. But even limiting the view to the islands, the conclusions above stated are directly opposed to those resulting from the directions upon the islands of the British Commissioners in 1891 and to those of the British Agent in 1892.

See British Counter-Case, Appendix, vol. ii, pp. 29–32.

British Commissioners' Report, paras. 85–87.

The British Commissioners say:

British Commissioners' Report, para. 91.

All the evidence collected indicates, that they [the rookeries] were, in 1891, in at least as good condition as they were in the preceding year;

while as to 1892 the British Agent says:

British Counter-Case, Appendix, vol. i, p. 151.

The rookery- and hauling-grounds themselves exhibited unmistakable evidence that the number of seals was greater in 1892 than in 1891,

Ibid., p. 152. and adds that during the whole time he was on the
89 islands he never heard any one say that there were
Page 67. fewer seals in 1892 than in 1891. Evidence as to increase in the number of seals is given at length in his
United States Counter-Case, Appendix, p. 385. Report. Mr. J. Stanley-Brown, on whose testimony alone the statement is made that "in 1892 a decrease appears over 1891," simply states that there was a "perceptible
Ibid., p. 393. falling off" of the females, but offers no proof. Mr. Townsend, who visited the Pribyloff Islands in 1885 and 1891, and made "frequent observations as to the condition of the rookeries," again visited the Pribyloff Islands in 1892 for the purpose of studying seal life. He makes no statement in his Report as to the comparative number of seals on the rookeries in 1891 and 1892.

Page 68. Though, as above stated, maintaining that all reference to the management of the Pribyloff Islands subsequent to the introduction of pelagic sealing are irrelevant, the United States Counter-Case here affirms that the Report of the British Commissioners "fails to establish a single instance where the management of the islands or the methods employed thereon have been changed *since 1880* from the 'appropriate and even perfect' system adopted in 1870," &c.

British Commissioners' Report, paras. 57, 662–669, 684, 694, *et seq.* While the British Commissioners, in their Report, do not treat the years here referred to as a separate period, they show that the methods employed on the islands, from the first, and including these years, were injurious, and caused, in the main, a general diminution in the number of seals resorting to the islands. They show, in particular, that in these years the standard weight of skins was deliberately reduced in order to permit younger and yet younger seals to be killed, and that the injurious effects of driving became yearly intensified.

The words quoted from the British Commissioners' Report in the above extract from the United States Counter-Case, moreover, entirely misrepresent the meaning of the Commissioners as separated from their context. In the Commissioners' Report the sentence from which they are taken reads as follows:

Ibid., para 662. **In short, from a transcendental point of view, the methods proposed were appropriate and even perfect, but in practical execution, and as judged by the result of a series of years, they proved to be faulty and injurious.**

Reverting to the reiterated contention of the
90 United States, that all references to the condition of
Page 68. the Pribyloff Islands after the introduction of pelagic sealing are irrelevant;—this is in no way admitted. The Commissioners were to inquire into all the causes affecting seal life and leading up to the present conditions, which are in the paragraph here referred to spoken of as depletion of the Pribyloff rookeries. It would be unreasonable to omit from consideration the influence of killing and methods on the islands during the last ten or twelve years. Moreover, the methods adopted on the islands should have been such as to provide for causes of decrease generally, when these should occur. If there had been no pelagic sealing, bad seasons or other natural causes might equally have

brought about a decrease similar to that which is alleged by the United States to have resulted from pelagic sealing. The facts show that in this event provisions would have been equally wanting to meet such a case. Therefore, the methods of control and management upon the islands were clearly imperfect and unfitted to meet contingencies.

The statement made on this page of the United States Counter-Case, that the killing of 100,000 young males annually could only have been injurious by leaving an insufficiency of males to fertilize the females, is incorrect; neither is the excessive killing alone referred to by the British Commissioners for proof of bad management on the islands. The attempt made to narrow down the issue to this one point in one of its aspects is thus again entirely misleading.

Page 69.

See British Commissioners' Report, paras. 395 *et seq.*, 674–693, 808–833.

Special attention is then paid, and at some length, to endeavour to weaken the force of a statement, made by Captain Bryant in an official Report, as to excessive killing on the islands in 1875, which is quoted by the British Commissioners.

As is stated in the United States Counter-Case on this page that:

> The reasons for his [Bryant's] Report of 1875 are clearly shown by an examination of his testimony before a Committee of the House of Representatives in 1876.

In reply to the question—

> Your opinion, then, is that the number of 100,000 on the two islands, authorized by law, can be regularly taken without diminishing the crop or number of seals coming to the island?—

H. R., 44th Cong., 1st Sess., Report No. 623, p. 99.

Mr. Bryant replied:

> 91 I don't feel quite sure of that, as will be seen in my detailed Report to the Secretary of the Treasury, included in the evidence which has been laid before the Committee. There were indications of diminution in the number of male seals. I gave that and another reason, which I explained at large in that Report.

Page 69.

The *other* reason then follows, and is that quoted in the United States Counter-Case. That this *other* reason was considered by Captain Bryant to have been of slight importance, is very evident when his Report is referred to. After writing of the frequency with which the hauling-grounds are driven from, he says:

H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83, pp. 176, 177.

> Thus, it will be seen the *method of killing* does not admit of the setting apart of a special number and taking the remainder for the quota for the market, and the only possible way to preserve the requisite number for breeding purposes is to restrict the number to be killed so far within the product as to insure enough escaping for this object.

Immediately following this comes the passage quoted in the Report of the British Commissioners (para. 678). Bryant then treats at some length of the great number of seals that by natural causes lose their lives while they are absent from the islands, and concludes his remarks on this subject in these words:

> *One other cause* should be stated that has directly contributed to diminishing the present stock of breeding males. During the season of 186[illegible], before the enactment of the prohibitory law, the several parties sealing there took 240,000 seals monthly [? mostly] of the products of the years 1866 and 1867. These would have matured and been added to the present stock of breeding males in the years 1872

and 1873, and to this *a part* of the prospective deficiency is to be attributed.

These are Captain Bryant's "reasons for his Report of 1875," and nothing further is necessary to show that, while there may have been other causes that contributed to the scarcity of breeding males, he evidently considered the one quoted by the British Commissioners to be that to which the diminution in this class of seals was to be principally attributed.

Page 71. A discussion is begun on this page of the United States Counter-Case of statements in the British Commissioners' Report respecting decrease between 1870 and 1880. It is, however, again insisted that the number killed on the islands is irrelevant, unless it can be shown that
92 this caused decrease. It is from this very aspect that
Page 71. the matter is considered in the British Commissioners' Report.

Page 72. Complaint is made of the alleged "unfairness" of the comparison of the annual number of skins taken during the Russian period with the 100,000 quota of the United States. This "unfairness" appears to be that referred to in the subjoined quotation from this part of the United States Counter-Case, in which it is said:

> The desire is to suggest the inference that the killing of 50,000 was excessive.

British Commissioners' Report, paras. 39–41. The Commissioners were, however, in the paragraphs of their Report, here specially referred to, concerned in giving a historical résumé of the circumstances connected with killing, and the number killed. Further information on the same subject will be found in the British Commissioners' Report, paras. 659–703. In para. 664 they state:

> From the experience thus recorded, it appears to be very clearly shown that in the average of years the killing of 40,000 to 50,000 seals on St. Paul was more than this—the principal seal-bearing island—could stand, while that practised during the later years of the Russian control scarcely fell short of the figure at which all continued increase in number of seals would cease.

From this conclusion, based on all the facts, they go on to discuss the greatly increased killing afterwards practised under the United States control. The years of great scarcity on the islands are not included in making the above comparison.

Allen, doubtless on Bryant's authority, states that in 1857 the—

Allen, "Monograph of North American Pinnipeds," p. 379. > rookeries are said to have become very nearly as large as now [viz., the early years of the United States control of which he wrote], the natives believing, however, that there has been since the last-mentioned date a very gradual, but steady, increase.

British Commissioners' Report, para. 663. See also para. 665. Ibid., p. 132, and paras. 776–779 There can, therefore, be no possible objection raised to the comparison of the years 1857 to 1867 (under Russian control) with those of the following years under United States control. The British Commissioners give the figures for these years as accurately as possible, and the authorities for the figures given are quoted by them. There
Page 72. 93 remain, unfortunately, among these years, 1863, 1864, 1865, and 1866, for which the figures are somewhat uncertain.

On this page of the United States Counter-Case, extracts and disconnected fragments from Russian correspondence relating to the islands are referred to, apparently for the purpose of indicating that a high rate of killing was maintained under the Russian régime from 1860 to 1866. An examination of these communications (imperfect as they are) shows, however, that they merely include requests or instructions from the Board of Management or the Chief Manager for the killing of certain numbers of seals for skins. There is nothing to show that these projects for killing were carried out. In fact, in one case, in 1860, the Chief Manager, though instructed to get 50,000 to 60,000 skins, expresses his doubt of being able to do so, owing to certain unfavourable conditions in 1859.

Page 73. United States Counter-Case, Appendix, pp. 193–199.

Of the years mentioned in this correspondence, for which the number killed on the islands has been ascertained, the following comparison may be made:

Year.	Number asked to be taken (Russian Correspondence).	Number taken (British Commissioners' Report, p. 132).
1860	50,000 or 60,000	21,590
1861	47,940	29,699
1862	Permitted at first, 80,000; reduced by order to 48,000.	34,294

For the remaining years to 1866, the numbers requested or ordered to be killed was as follows:

1863	80,000
1864	70,000
1865 (by Board)	53,000
" (by Manager)	48,000
1866	50,000

The approximate numbers actually killed, and shown in the second column, as ascertained from the best available data, are, however, in these years much lower.

British Commissioners' Report, p. 132.

It is not to be supposed that in thus failing to carry out the instructions as to killing, the persons on the islands were unable to obtain enough seals. The difficulty arose chiefly, if not entirely, from the time consumed and the amount of labour involved in curing a large proportion of the skins by drying, as was then customary.

Elliott, Census Report, foot-note pp. 76, 77.

94

Page 73.

The special circumstances connected with the excessive number taken in 1867 (75,000) are explained in the Report of the British Commissioners.

British Commissioners' Report, paras. 807, 779.

The British Commissioners are on this page of the United States Counter-Case charged with a flagrant violation of their instructions as to impartiality, because they do not quote the whole of a paragraph by Elliott referring to the proportion of bulls to females. The part of the paragraph quoted, however, gives Elliott's general conclusions. It would not have been pertinent to the point under consideration to quote the exceptional cases also mentioned by him. He notes both much larger and much smaller numbers of

Page 74.

females to a bull than the average. In correcting the "omission" of the Commissioners, the United States quote only that part of the additional matter which refers to the exceptional cases of very *large* numbers of females.

Moreover, the statement that Mr. Elliott's estimate was not entirely satisfactory to himself, appears from the first part of the quotation given by the British Commissioners, as to the difficulty he found in making an estimate. The entire passage is here cited, the italicized parts being those quoted by the British Commissioners. The words in brackets are those which are omitted from the quotation as given in the United States Counter-Case:

Elliott, United States Census Report, p. 36.

I found it an exceedingly difficult matter to satisfy myself as to a fair general average number of cows to each bull on the rookery; but after protracted study, I think it will be nearly correct when I assign to each male a general ratio of from fifteen to twenty females at the stations nearest the water; and for those back in order from that line to the rear, from five to twelve; [but there are so many exceptional cases,] so many instances where forty-five and fifty females are all under the charge of one male; [and then, again, where there are two or three females only, that this question was, and is, not entirely satisfactory in its settlement to my mind].

It is next alleged, that the Report of the British Commissioners—

> fails to give any testimony to show how many females constituted a harem in 1891, &c.

Page 74. British Commissioners' Report, para. 55. British Counter-Case, Appendix, vol. i, p. 140.

95 It will be found, however, that the Commissioners give a statement of this kind in the very paragraph following that to which reference is here made by the United States. Further evidence of the same kind, for 1892, is contained in Mr. Macoun's Report.

Page 75.

It is here stated, in the United States Counter-Case, in connection with the alleged "surplus of virile males," that a photograph, by Mr. Stanley-Brown (which is reproduced in the Appendix to the Counter-Case), shows a—

> number of vigorous bulls located on the breeding-grounds unable to obtain consorts.

An inspection of the photograph referred to will show how insufficient the evidence it affords is. It shows a few bulls hauled out at the back of the breeding-ground, but with them are some smaller seals, which may or may not be females.

Mr. Macoun, in fact, states that at North-east Point (a part of which is shown by Mr. Stanley-Brown's photograph) there were, in his opinion, more old bulls than on all the other rookeries combined, but that even there the number was not great, and many of those characterized by Mr. Stanley-Brown as "old bulls"—

British Counter-Case, Appendix, vol. i, pp. 140, 141.

> showed the "grey wig," which proved them to be not yet fully grown, while others were, without doubt, worn-out old bulls, no longer fit for service. That the majority of them were in this condition is proved by the fact that though attempts at service by "grey wigs" were not infrequent, I never saw one of these old bulls pay the slightest attention to any females that might pass near them.

United States Counter-Case, Appendix, pp. 264, 265.

Professor Evermann's count of part of one of the smallest rookeries is further referred to to show an abundance of bulls, in proportion to the number of females.

But the reference here made to Professor Evermann's evidence is misleading. This gentleman counted the seals on two parts of Lukannon rookery. His first count of a small area (deducting two bulls without pups near them) gives an average of over nineteen females to each bull. (This is arrived at by taking each pup as representing a female.)

96 A second count of a larger area of the same rookery shows an average of forty females to each bull (deduced as above). He maintains that many of the pups here did not belong to the bulls, but why he should have chosen part of the rookery with an excess of pups is not explained. He further adds that many cows and pups were *not counted*, because they "did not seem to belong to any particular family." Page 75.

Thus, the statement made in the United States Counter-Case, that Evermann's count showed an average of fifteen females to each bull, is incorrect, and Evermann's statements are themselves inaccurate by reason of his omission to count the whole of the females and pups actually seen by him.

On a later page, Professor Evermann says that cows were more abundant in proportion to bulls on Ketavie rookery than on Lukannon. United States Counter-Case, Appendix, p. 268.

A count made by the same gentleman at Little East rookery, St. George Island, again gives an average of about forty cows to each bull. Ibid., p. 273.

The British Commissioners having quoted in their Report certain statements made by Mr. H. W. Elliott, which throw important light on the effect of the excessive killing of male seals upon the Pribyloff Islands, a reference to these statements is made in the following terms on this page of the United States Counter-Case:

> The Commissioners also rely on a newspaper extract, which purports to be a summary of a Report made by Mr. Henry W. Elliott in 1890 to the Secretary of the Treasury, to establish certain alleged facts.

The circumstances respecting Mr. Elliott's specially-authorized investigations on the Pribyloff Islands in 1890, the fact that his Report of these investigations has not been made public by the United States Government, and the further fact that it has actually been refused to furnish it to the Agent for Great Britain, have already been alluded to. It would appear that when Mr. Elliott found that the United States Government did not intend to publish his Report, he communicated to the press, over his signature, a summary of his conclusions, being that contained in his letter submitting the Report as a whole to Secretary of the Treasury Windom. The matter thus made public, will be found in the Appendix to the British Case. Its authenticity, so far as known, has never heretofore been questioned either by the United States Government or by Mr. Elliott. The United States Government are in possession of the original Report. British Case, Appendix, vol. iii. "United States No. 2 (1891)," p. 53.

97

An objection is next raised in the United States Counter-Case, to the effect that certain figures, quoted from Mr. Elliott, relating to the state of the rookeries on the Priby- Page 76.

loff Islands in 1890, and showing a want of virile male seals there, appear in the part of Mr. Elliott's statement given to the press by him, after his signature. As it is stated in the publication in question that the figures were furnished by Mr. Elliott, it is to be assumed that they were an additional excerpt from his full Report. If they are not, the United States is in a position, by producing the Report, to prove that they are not contained in it. The British Commissioners do not vouch for the accuracy of the "actual figures" quoted. They say expressly in this case that Mr. Elliott—

Para. 433. does not explain in what way this numerical estimate was arrived at.

But they fail to see any evidence in Mr. Elliott's attempt to put the circumstances of the decrease of male seals in figures, to do otherwise than illustrate these circumstances to the best of his ability.

In the second paragraph on this page of the United States Counter-Case, a remark made as subsidiary to others included under paragraph 44 of the Report of the British Commissioners is chosen for attack. This remark is brought into special prominence for the purpose of attempted rebuttal, in the following terms:

The second mode by which they endeavour to show a decrease in the seal herd prior to 1880 is by pointing to an alleged recognition thereof on the part of the lessees in the reduction made by them of their catch in 1875, and to an alleged lowering of the standard of weights of skins.

British Commissioners' Report, para. 44. The statement made by the Commissioners as to reduced number of skins taken in 1875 is denied by the United States. In thus denying, they cite the British Com-

Page 76. 98 missioners' Report (p. 132), where a Table is given showing the total killing in each year on the Pribyloff Islands. But on referring to this Table, it is found that the number killed in 1875 was, as stated by the Commissioners, less than that in 1872, 1873, and 1874 (over 6,000 less than in the last-mentioned year).

Reference is further made in this connection to vol. ii of the Appendix to the United States Case, in contravention of the British Commissioners' statement, but the Tables there found (pp. 558–585) are those of salted seal-skins sold in London. Such sales do not correspond with the actual number of seals taken on the islands in the same year, as skins have often been held over from one year to the next in London; and a part of the skins taken in the autumn have almost invariably been held over till the next year in the Pribyloff Islands themselves.

The third reference given in support of the denial of this particular statement of the Commissioners, is to a Table on p. 427 of the United States Counter-Case. It must be explained that the statistics of killings on the Pribyloff Islands to which the Commissioners were able to refer, were those which had been published by the United States. Therefore, when, as in this instance, the United States now produce new and more detailed figures, alleged to have been on file in the Treasury Department, no proof of unfairness or inaccuracy can justly be urged as against the Commissioners. Thus, in the Tables of killings here-

Senate, 51st Cong., 2nd Sess., Ex. Doc. No. 49, p. 29.

tofore accessible, it was impossible to apportion the number of "pups" killed for food in each particular year, for only the grand total for a number of years was given. But accepting the new Table here printed and referred to by the United States, the killing in 1875 is even there shown to have been more than 4,000 less than in 1874. A reference to the diagram given in the Commissioners' Report will show graphically the character of the change referred to by them as occurring in 1875.

Diagram V.

On this page of the Counter-Case, the United States deny that any lowering of the standard weight of skins taken on the islands occurred until 1886, contrary to statements made in the British Commissioners' Report (para. 694, &c.), but in so doing the United States ignore the absolute evidence to this effect by one of their own principal witnesses (H. H. McIntyre), which carries the lowering of weight back to 1883. It is, however, admitted that a lowering of standard weights occurred in 1886. It is stated in the Case of the United States that a decrease became perceptible on the islands in 1884–85. The lowering of standards is referred to by the Commissioners merely as an index of the decrease on the islands, and the date of such lowering now fixed by the United States does not agree with that of admitted decrease as stated in the United States Case.

Page 77.

British Commissioners' Report, para. 696.

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Reference is next made by the United States to a new Table by Mr. Heilbronner, alleged to show the weights and prices of skins from the Pribyloff Islands from 1874 to 1889 (both inclusive). The prices given in this Table have no bearing on the present question, as these depend on many other circumstances besides the weight, quality, or size of skins offered for sale.

As to this Table, see Appendix II, *post*.

From the Table printed, the "twelve additional columns showing percentages" have been "omitted for the sake of brevity." Owing to this fact, the Table affords only a basis of computation, not any distinct evidence as to the conditions from year to year.

Further, as already stated, the weights of skins taken are referred to by the British Commissioners only as a rough index of the sizes and ages of the seals killed. No information is afforded as to the manner in which these weights have been determined in the Table now presented by the United States, nor as to whether they are those of skins as taken on the islands, or those of salted skins as sold. It would, however, appear from the classification by sizes adopted in the Table, that the latter are meant, as no such classification by sizes is made on the islands. The weights of skins spoken of by the British Commissioners are, on the contrary, those taken or estimated on the Pribyloff Islands. Messrs. Lampson state that the weights of salted skins are greater than those of skins in the raw state; so that if the weights given in Mr. Heilbronner's Table are those of salted skins, they do not compare in any satisfactory way with the weights referred to by the British Commissioners.

British Counter-Case, Appendix, vol. ii, p. 261.

Fortunately, however, we are relieved from the ambiguities incident to the statement above made, by the facts disclosed in the detailed Table and analysis of skins sold, contained in the Appendix to the British Counter-Case. Every skin there included has been *measured* with accuracy, and the Table includes practically every seal killed for market on the Pribyloff Islands from 1873 to 1892 (both inclusive). The subsidiary question of weight, and the doubt as to place of weighing and character of skin when weighed, may, therefore, be dismissed. The almost continuous decrease in *sizes* is the main point in question.

Ibid., p. 255. Page 77.

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See British Counter-Case, p. 257.

Still further, in the statement made on the part of the United States, the *average* weight of skins is taken. This is little clue to the nature of the killing generally, for whereas in the earlier years a sufficient number of skins of medium weight (which are those of greatest value) may have been available, in later years the *average* may (lacking these) have been made up of extra large and extra small skins.

United States Counter-Case, p. 77.

The denial of the United States as to the reduction in standard weights of skins is therefore shown to rest on unsound and incorrect evidences. More than this, it is wholly disproved by the disclosures of the detailed Tables last referred to.

Mr. Webster's evidence, with other evidence, is quoted by the British Commissioners (para. 677) in support of the statements of natives detailed in a preceding paragraph, respecting the decreasing number of seals taken at North-east Point. An attempt is made on the part of the United States to traverse Webster's evidence alone. But on referring to the paragraph of the Commissioners' Report here cited, it will be found that the statement made in the Counter-Case of the United States is erroneous. Both Mr. Webster and Mr. Fowler are quoted as authorities for the figures given by the British Commissioners. Further, on referring to the Table specially compiled to rebut this evidence, and printed in the Appendix to the United States Counter-Case, it will be found that both these gentlemen are fully justified in the statements made by them to the Commissioners. It is to be presumed that both spoke from memory, and not by the book, and precision to units is therefore not to be looked for. Webster said that in 1874 and 1875, 35,000 to 36,000 skins were taken each year at North-east Point. The Table shows in these two years respectively 34,526 and 35,113 skins. Fowler said that 29,000 and 18,000 skins were taken at North-east Point in 1879 and several succeeding years. The Table shows: 1879, 29,174; 1880, 25,862; 1881, 17,952; 1882, 23,303 skins.

101

Page 78.

The Commissioners further give the skins taken in 1889 and 1890 as 15,076* and 5,007 respectively, classing these

* In a Table printed in the Appendix to the United States Counter-Case (p. 422), the number of seals killed here in 1889 is given as 28,794. The difference between this statement and the official statement quoted by the British Commissioners is not explained.

as official figures. A printer's error has placed two asterisks (*) in the text of this page of the Commissioners' Report, and has omitted the reference at the foot of the page to which one of them should apply. A brief examination would have shewn that the figures referred to were those in Mr. Goff's official Report on the Pribyloff Islands for 1890. The figures given by the Commissioners are indentical with those of the Report in question. On examining the figures it will, however, be found that an error in addition has been made in the Congressional document referred to; the total number of skins derived from North-east Point in 1890 should read 6,592, instead of 5,007. This difference has, however, no bearing on the subject under discussion.

51st Cong., 2nd Sess., Senate Ex. Doc. No. 49.

In respect to the question of the driving of seals in 1879 from the vicinity of rookeries previously reserved and exempted from driving.—Statements made on this subject (and with special reference to Zapadnie and Polavina rookeries) by the Commissioners are denied by the United States. In making these statements (though confirmation was obtained from other sources), reliance was evidently placed upon the official Reports of Mr. H. W. Elliott. In his Report bearing date 1880, Mr. Elliott, speaking of Zapadnie rookery and the hauling-grounds in its vicinity, says:

Pages 78, 79.

> The "holluschickie," that sport here on the parade plateau, and, indeed, over all of the western extent of the English Bay hauling-grounds, *have never been visited by the natives for the purpose of selecting killing drives since 1872, inasmuch as more seals than were wanted have always been procured from Zoltoi, Lukannon, and Lower Tolstoi points,* which are all very close to the village.

Op. Cit., p. 55.

102 Respecting Polavina he says in the same Report:

> For the reason cited in a similar example at Zapadnie, *no "holluschickie" have been driven from this point since 1872,* though it is one of the easiest worked. It was in the Russian times a pet sealing-ground with them.

Op. Cit., p. 56.

Mr. Elliott investigated the circumstances in 1872–74, and revisited the islands in 1876. When he again revisited the islands in 1890, he states that he found that driving had been extended to Zapadnie and Polavina rookeries in 1879, as quoted by the British Commissioners.

British Case, Appendix, vol. iii, Part III. "United States No. 2 (1891)," pp. 57–59.

During all his stays upon and visits to the Pribyloff Islands, Mr. Elliott was specially engaged in an official capacity in investigating the conditions of seal life there for the United States. The Commissioners were thus fully justified in assuming that the statements made by him in official Reports were correct.

But the United States have, in the Appendix to their Case, published, for the first time, certain Tables by Mr. Max Heilbronner, Secretary of the Alaska Commercial Company, relating to the killing in each year from the various rookeries. These are now referred to as contradicting the statements quoted by the Commissioners. It may be that the Secretary of the Company has possessed fuller information in this case than the Government officials, but

Appendix, vol. ii, pp. 117–127, 167–172.

it is significant that the official annual Reports of the Government are not here referred to. In these Tables Polavina is designated "Half-way Point," and Zapadnie appears to be included under the general designation of "South-west Bay." As the numbers are not in all cases given separately for these two places, it is absolutely impossible to make a statement from the Tables of the actual number of seals taken in each in every year, but the number of recorded "drives" may be taken as an index of the increasing extent of driving from these places in later years. The number of drives as now stated by the United States is as follows:

United States Case, Appendix, vol. ii, pp. 117–127.

Pages 78, 79.

103 Year.	South-west Bay (including Zapadnie).	Half-way Point (Polavina).
1871	4	1
1872	1	1
1873	3	0
1874	0	0
1875	7	1
1876	3	1
1877	6	3
1878	6	3
1879	7	3
1880	5	4
1881	5	4
1882	10	5
1883	9	5
1884	9	9
1885	6	8
1886	12	9
1887	8	6
1888	8	8
1889	8	7

The substantial accuracy of the remarks made by the British Commissioners as to the increased area of driving in later years, irrespective of Mr. Elliott's very definite statements on the subject, is further shown by the evidence of Mr. H. H. McIntyre, appended to the United States Case, though this evidence is intended for another purpose, *i. e.*, to explain away the alleged deficiency in number of killable seals which occurred in 1879. Mr. McIntyre says:

United States Case, Appendix, vol. ii, p. 50.

> In order that the selection should be made from as large a number as possible, and to satisfy the requirements of the Treasury Agents in charge, who demanded that all the rookeries be worked in regular rotation, *we commenced in 1879 or 1880 to "drive" with greater frequency from the more distant and less accessible grounds.* . . . . With this exception there was no change in the manner of conducting the business from 1870 to 1889.

United States Case, Appendix, vol. i, pp. 407, 408.

Professor Allen also says:

> During the last two or three years, however, and in consequence of the decline from the former status of the herd, it has been necessary to lower the age of seals selected for killing, and also to redrive portions of the herd.

Page 79.

The Counter-Case of the United States next states that "the question of over-driving and redriving has already been fully treated of in the Case of the United States." It is here passed over practically without remark, except that, "*if any occurred*," it was directly due to pelagic
104 sealing. This admission confirms the statement of the British Commissioners, to the effect that the "quota" to be taken on the Pribyloff Islands had become

practically fixed, and that no regard to seal life was had in endeavouring to fill the "quota."

If any rights exist to seal on the high seas, it is absurd to charge the pelagic sealers with the results of the over-driving practised to secure a "quota" on the islands. Even if no such right exists, it shows an entire absence of proper care, to have permitted damaging practices on the islands in the endeavour to secure a "quota," before the question of rights and protection had in any way been settled.

"PELAGIC SEALING."

It appears to be assumed by the United States, in dealing with pelagic sealing, that the statement that killing at sea is "indiscriminate"—*i. e.*, that it includes both sexes—is sufficient in itself to condemn such sealing. The supposition that large numbers of males alone might be killed without any prejudicial effect on seal life, and which arose during the Russian régime, appears to have still a very firm hold; while the principles of "natural selection" which have come to be recognized during the past twenty or thirty years, with other scientific facts alluded to in the Report of the British Commissioners and in the Counter-Case of Her Britannic Majesty, appear to be disregarded in the Counter-Case of the United States. Further, the commonly recognized fact that, even in the case of *domestic* animals, as well as in that of wild animals artificially preserved, large numbers of females are usually and necessarily killed, is ignored.

Page 80.

United States Case, p. 131.

Care is further taken, in this first paragraph, to endeavour to prejudice the Court by characterizing the evidence quoted by the British Commissioners as "interested." It will be observed, however, that the British Commissioners have fully recognized and allowed for any motives of self-interest which may have affected the evidence obtained, and that in their endeavour to present the facts, they have not assumed as indubitably correct all the statements made to them.

British Commissioners' Report, paras. 627, 634.

105 It is next stated in the United States Counter-Case that the "three propositions," forming the "apology" of the British Commissioners for pelagic sealing, will be treated "in the order of their importance as recognized in the Report."

No apology is offered or required for killing animals at large upon the ocean, in the absence of International Agreements prohibiting such killing. As to the order followed in the United States Counter-Case, it appears to be based on that referred to in paragraph 77 of the British Commissioners' Report, where, however, two propositions, not three, are formulated, and these two are there stated to be the principal allegations of those opposed to pelagic sealing, not to represent the order of importance in fact. The actual order and wording of the headings found in the British Commissioners' Report under the chapter on pelagic sealing is as follows:

Page 97 *et seq.*

(*a.*) Origin and Development.

(*b.*) Methods.
(*c.*) Proportion of Seals lost.
(*d.*) Composition of Catch.
(*e.*) Future of the Industry.

The first subject selected for attempted rebuttal is thus expressed in the Counter-Case of the United States:

"1. *That the percentage of female seals in the pelagic catch is not large.*"

In the opening paragraph below this heading, is found one of numerous instances of insinuations as to motive on the part of the British Commissioners for which there is, in fact, no justification. Part of the evidence printed by the British Commissioners is characterized as—

so-called "evidence," alleged to have been obtained from Indian hunters, ... and in which there is a careful avoidance of names of informants.

Page 81. But on the next page, the statement by the same Commissioners respecting the possible existence of self-interest in some of the witnesses examined by them, is endeavoured to be employed as a means of minimizing the importance of that part of the evidence.

106

It is scarcely necessary to state that the British Commissioners did not consider it their mission to procure sworn evidence on all subjects investigated by them. Their mission was purely scientific and practical, and on referring to the first part of their Report, it will be found that they fully recognized this fact. They write:

British Commissioners' Report, para. 23.

It may be observed further, that in obtaining evidence from persons of experience or knowledge of the subject, we adopted, in general, the informal plan of free interviews and independent conversation. In this way we acquired very distinct and trustworthy knowledge of their opinions and experiences.

In so doing, they followed the same plan with that adopted by their colleagues from the United States, who similarly write:

United States Case, pp. 334, 335. Although the testimony gathered by us on this and other points was not given under oath, its value, in our judgment, is not in the least lessened by that fact. . . . . In short, the investigation was conducted precisely as it would have been had the question been one of scientific rather than diplomatic importance.

The only difference which must be noted between the procedure of the British and United States Commissioners, is that indicated in the last-quoted remark, *i. e.*, that the United States Commissioners appear to have regarded the questions examined by them rather as of diplomatic than as of scientific importance, though adopting a scientific method of investigation.

There can be no doubt that in both cases, if further particulars respecting the evidence collected should be required, these can be supplied by reference to the notes of interviews, &c., held by the respective Commissioners at the time; and it is submitted that statements made in good faith, and respecting matters of fact or evidence, should be accepted as true to the best of the knowledge and belief

of the Commissioners specially appointed to investigate the subject, whether those of Great Britain or those of the United States.

It is perhaps unnecessary again to draw attention to the manner in which a few words, separated from their context and incorporated in a new sentence, may be made to convey a false impression; but another instance of this occurs in the particular page of the United States Counter-Case here dealt with. The British Commissioners write: Page 81. 107

> And while it *is not maintained* that the evidence of such practical sealers is entirely untinctured by motives of personal interest, it must be evident that these men know more on the subject than any others. British Commissioners' Report, para. 634.

This statement is employed in the following manner in the Counter-Case of the United States:

> The second class of testimony presented to *sustain the position of the Report* is obtained from sworn statements of Canadian sealers, which the Commissioners admit are not "entirely untinctured by motives of personal interest." United States Counter-Case, p. 81.

On the next page we find the evidence cited by the British Commissioners further characterized as *admittedly untrustworthy.*

Referring to the proportion of females taken in the pelagic catch, and evidence on this point presented by the British Commissioners, objection is made on the part of the United States that this evidence varies greatly in different cases. The British Commissioners, however, particularly note this very point, writing:

> It is only natural, and is entirely in accord with what might be expected, that the proportions of seals by sexes and ages should be found to differ very considerably in different instances, even in a single year, in conformity with the dates or places in which the greater proportion of any particular catch was secured, and the kind of seals in each case fallen in with. British Commissioners' Report, para. 614. See also para. 648.

And add:

> The very fact that these statements, though taken at different times, and while varying considerably from the point of view of numerical proportions, tally very well in the main, one with another, is an inherent proof of their credibility.

The ensuing argument, directed against this evidence, and in which it is endeavoured to contrast it with the statement that the methods and practices on the Pribyloff Islands have resulted in the existence of a large surplus of females, is based on various assumptions, and is difficult to follow, as these assumptions are not set out. The most important of them however, appears to be;—that the proportion between males and females in the catch of any vessel should represent the average proportion of males and females existing everywhere, or at the least that a mean of the catches should represent such average. The explanations given in the British Commissioners' Report (some of which have just been quoted), are, however, sufficient to show that the first is not a reasonable hypothesis; while, as to the second, it is quite conceivable that pelagic sealing, might, as a whole, be carried on at such times or in such places as to include a relatively very great proportion of any particular age or sex of seals. Pages 81, 82. 108

Page 82. The further statement made by the British Commissioners, to the effect that an abnormal abundance of females obtains at the present time, is characterized as not substantiated by facts advanced by the Commissioners. The facts relied upon are, it is true, not recapitulated in this particular part of the Report, but in Chapter IV (p. 114 *et seq.*) ample details on this subject will be found.

But this is still more clearly shown by a comparison of the possible number of skins of bearing females contained in the whole North-west catch for twenty years, as included in the British Counter-Case. This *possible* proportion is much lower than that given in the statements of sealers quoted by the British Commissioners, which statements refer to the past few years only.

British Counter-Case, p. 200, and *post*, p. 110.

Ibid., p. 251 *et seq.* In addition, in the Counter-Case presented by the British Government, notice is taken of the great number of barren females now found at sea, a fact directly bearing out the evidence of other kinds already obtained on this subject.

Pages 82, 83. As to the nature of the "proof" offered in the Case of the United States respecting the number of female skins contained in the pelagic catch, remarks have already been made in the British Counter-Case such as to show that this is entirely inconclusive and untrustworthy.

British Counter-Case, p. 198 *et seq.*

To corroborate the assertions made in the Case of the United States, Captain Hooper, M. Malonavonski, Mr. Grebnitsky, and Messrs. C. W. Martin and Sons are now further adduced.

109 The United States revenue cutter "Corwin," Captain Hooper, was occupied for twenty-six days in hunting seals during the summer of 1892. The whole number of seals killed, however, appears to have been forty-one, a result so small as to evidence either inexperienced or incompetent hunters. Of this number, twenty-nine are stated to have been females, a proportion which does not differ very largely from that given by several of the pelagic sealers, but which upon so small a total number means little as compared with the experience embodied in their statements.

United States Counter-Case, Appendix, p. 217. It will further be observed, on turning to the Table prepared by Captain Hooper, that nearly half (nineteen) of the seals taken were obtained within 20 miles of the Pribyloff Islands, and that no data are given as to the time occupied in the capture of seals at different distances from the islands, such as to show what the respective proportions of males and females might have been in the case of commercial sealing. Neither is any statement made to the effect that seals were taken impartially, as met with.

Page 83. M. Malonavonski is next quoted as affirming that over 90 per cent. of 2,700 skins taken from vessels seized in the vicinity of the Commander Islands were those of females. His evidence on this subject will, however, be found to be of the most indefinite character.

Ibid., p. 374. Mr. Grebnitsky is next quoted as affirming that 96 per cent. of the seals taken at sea are females! This gentleman has had long experience as Superintendent of the Commander Islands, and any statement made by him must be

received with respect, but we may be pardoned for doubting such a statement as that here attributed to him, particularly as it is unsupported by any details of fact, and is entirely in opposition to other evidence.

Messrs. C. W. Martin and Sons are next referred to respecting the sex of a lot of 1,028 skins supposed by them to have been taken at sea, and received from Petropaulovski. It is stated that these were part of the 2,700 skins seized by Russian cruizers on the Asiatic side of the Pacific, and upon which Messrs. Malonavonski and Grebnitsky based their statements. Messrs. Martin and Sons, however, give the percentage of females at 83.76; of males, 1.66; and doubtful, 14.58, though M. Malonavonski
110 had affirmed that an expert found *no difficulty* in separating the male and female skins in the original lot of 2,700.

Respecting whose connection with the sealing industry, see British Counter-Case, Appendix, vol. ii, p. 233; and United States Case, p. 267.

British Counter-Case, p. 308.

Page 83.

Lastly, certain depositions of a Mr. Behlow are referred to in this connection, in which he professes to separate male and female skins contained in certain relatively small catches brought to San Francisco in 1892.

It will subsequently be shown that the statements and depositions of this witness are wholly untrustworthy.

See Appendix II, *post*.

Reviewing the evidence brought forward on the part of the United States in their Counter-Case on the subject of the proportion of females in the pelagic catch, we may, at the least, set the statements of the few witnesses cited, against those of a like number of witnesses representing a similar number of seals among the numerous witnesses cited by Great Britain. The whole number of seals spoken of by Captain Hooper is too small to enable any just deduction to be arrived at; while the other witnesses referred to by the United States are, without exception, interested in the industry of sealing upon the breeding-islands, and, therefore, it may reasonably be supposed, likewise interested in decrying all sealing at sea.

Page 84.

It has already been stated (p. 104) that the killing of females *per se* is not admitted to be reprehensible, while the complete analysis of the skins resulting from the pelagic catch during the past twenty years, shows conclusively that not over 38 per cent. of these could by any possibility have been bearing females.* It has further been stated that one of the most important objects of any regulations which may be proposed is that of eliminating the last-mentioned element from the pelagic catch.

British Commissioners' Report, para. 80.

Under the circumstances mentioned, it can be of little utility to pursue in detail any controversy respecting the composition of various individual small lots of skins such as there cited on the part of the United States, even
111 if the sexes included in them had been correctly determined, and the subject may rightly be dismissed here.

* At p. 200 of the British Counter-Case this figure is given at 50 per cent., but the calculation there given is based upon the assumption of only 15 per cent. of the catch being males, and this percentage occurring uniformly throughout the whole bulk. As a matter of fact, there are 20 per cent. of the catch which are too large to be the skins of females. The figure above given is based on a recalculation admitting this correction.

The second proposition formulated for denial by the United States is in their Counter-Case presented as follows:

"2. *That pelagic sealing in Behring Sea is not so destructive to seal life as pelagic sealing in the North Pacific.*"

British Commissioners' Report, paras. 138, 648.

The statement here attributed by the United States to the British Commissioners was not, however, made by them. They have stated that the spring catch was more destructive than any other in proportion to the number of skins obtained; but the spring catch is not the equivalent of the entire catch made to the south of Behring Sea, which embraces much of the summer, and lasts till about the end of June. The statement actually made by the British Commissioners, as employed as a basis of argument in the United States Case, is therefore not only inverted, but substantially changed.

British Commissioners' Report, paras. 645-647.

The circumstance that practically no gravid females are taken by pelagic sealers in Behring Sea is characterized as an "assumption" of the British Commissioners, though it rests on ample evidence.

British Counter-Case, Appendix, vol. ii, pp. 14-20.

The question as to the killing of females in milk in Behring Sea, and the effect of this upon pups on shore, next alluded to in the United States Counter-Case, will be discussed in connection with the more detailed treatment of this subject found in following pages of the Counter-Case of the United States.

Page 85.

The argument advanced in this page of the United States Counter-Case against the general proposition at the head of this Chapter, depends on a series of assumptions, to discuss which is unnecessary, because they have elsewhere been treated at length. The fallacy that the killing of females is in itself reprehensible appears to underlie the statements, but it is in addition apparently assumed that all females met with at sea are fertile, *i. e.*, that there are no virgin or barren females; that in stating the period of gestation of the fur-seal as nearly twelve months, full twelve months is meant; that, for instance, eleven months would not be "nearly twelve months," that all females are covered on land, and that a female just fertilized may be described as a "gravid female," the injury to seal life being equally great in the killing of each class.

British Counter-Case, pp. 198, 251-257, 145.

112

It is next asserted that the "designed implication" of certain statements made by the British Commissioners is to show that "very few nursing females are taken by pelagic sealers," and is based on "pure assumption," a reference being given to para. 649 of their Report. But in the immediately preceding paragraphs of the Report, proof has been adduced to this effect, and further proof is brought forward and discussed in the Counter Case of Great Britain and its Appendices to the same effect, and to the effect that such few females in milk as may be killed in Behring Sea are often "running dry." It is also shown that their presence at sea may be accounted for by various causes of disturbance upon the breeding-islands, in most,

British Counter-Case, pp. 218, 219.

Ibid., Appendix, vol. ii, pp. 22, 23

if not in all cases. The evidence of Captain Hooper, referred to in this connection by the United States (on the strength of the forty-one seals killed by him), in showing that a considerable proportion of seals in milk killed were 200 miles from the Pribyloff Islands, goes far to prove that at least this proportion of such seals could no longer have had any interest in or regular connection with those islands, and tends to substantiate the remarks made by the British Commisssioners, and those in the Counter-Case of Great Britain, on this subject.

United States Counter-Case, Appendix, p. 217.

British Commissioners' Report, para. 314. British Counter-Case, pp. 218 219.

On this and following pages of the United States Counter-Case (to p. 93), an extended notice is given to the investigations of the British Commissioners on the subject of the mortality of young seals in 1891. Care is, however, first taken to describe these examinations as "cursory." The Commissioners are represented as endeavouring to "support a position," and it is added:

Page 88.

It is evident, from the efforts made and the theories advanced to explain this mortality that the Commissioners considered the presence of these bodies *primâ facie* evidence of the fact they endeavour to disprove.

Introductory remarks of the above character scarcely lead to the belief that any impartial discussion of the facts noted and commented on by the British Commission-
113 ers is intended. This is fully borne out by what follows. It is stated:

These officials [the Commissioners] have, through some strange circumstance, been led into the belief that they were the first to observe this mortality among the pups on the rookeries, from which belief they draw the inference that "the death of so many young seals on the islands in 1891 was wholly exceptional and unprecedented."

The explanation given in para. 346 of the British Commissioners' Report is sufficient to show that, in so far as they could ascertain by inquiry upon the islands in 1891, they *were* the first to observe and comment on the mortality in question. But if further evidence be required, it will be found that Mr. J. Stanley-Brown says:

By the time the British Commissioners arrived [28th July] the dead pups were in sufficient abundance to attract their attention, and they are, I believe, under the impression that they first discovered them.

United States Case, Appendix, vol. ii, p. 19.

In a foregoing part of the same paragraph, however, Mr. Stanley-Brown had said:

In the latter part of July 1891 my attention was called to a source of waste, the efficiency [*sic*] of which was most startlingly illustrated.

But Mr. Milton Barnes, special employé of the United States Treasury on St. Paul Island, is (except in regard to date) even more definite on this point. In a deposition furnished by him, and included in the Appendix to the United States Case, he says:

Ibid., p. 101.

One day, during the latter part of August or fore part of September last (exact date forgotten), Colonel Joseph Murray, one of the Treasury Agents, and myself, in company with the British Commissioners, Sir George Baden-Powell and Dr. Dawson, by boat visited one of the seal rookeries of that island, known as Tolstoi or English Bay. On arriving there our attention was at once attracted by the excessive number of dead seal pups, whose carcasses lay scattered profusely over

the breeding-ground or sand beach bordering the rookery proper, and extending into the border of the rookery itself. *The strange sight occasioned much surmise at the time as to the probable cause of it.*

Page 86. 114 Mr. Barnes then states that some days afterwards he went with Mr. Fowler to Polavina rookery, where he found similar conditions with respect to mortality of young to prevail. He adds:

United States Case, Appendix, vol. ii, p. 102. This condition of the rookeries in this regard was for some time a common topic of conversation in the village by all parties, including the more intelligent ones among the natives, &c.

Page 87. The evidence referred to on this page of the United States Counter-Case to endeavour to show the occurrence of an annually increasing number of dead pups since 1885, has already been treated in the Counter-Case of Great Britain, p. 208 *et seq.*, and has been there shown to be wholly inconclusive in that respect, and to rest on erroneous statements.

The extracts above given are alone sufficient to show that the mortality in 1891 was unprecedented, as stated by the British Commissioners; and that it had not existed, as affirmed by the United States, for "several years."

The statement as to the existence of the opinion on the islands that pups had died in former years because of the killing females at sea, is endeavoured to be supported by the retrospective affidavits already dealt with in that part of the British Counter-Case above referred to.

Pages 88, 89. Much stress is here laid on the discovery of two passages in previous Reports, in which H. H. McIntyre and J. H. Moulton have made general statements to the effect that killing females at sea resulted in death of pups on the islands. No facts or instances are cited in support of these statements, to which no importance was attached at the time, and to which attention has only now been drawn. They are now brought prominently forward for the purpose of maintaining that the cause of the mortality of pups in 1891 alleged by the United States had long been recognized. It is there said:

This explanation [death of mothers] of the cause of death of pup seals is not recognized by the Report except to contradict it.

British Commissioners' Report, para. 355. As a matter of fact, the explanation referred to is discussed in some detail, and is found to be untenable by reason of the date of the mortality, and on other rational and fully explained grounds.

Respecting the causes of death of young suggested as probable by the British Commissioners:

115 (*a.*) This is described in the United States Counter-Case as "driving and killing of mothers." But while the British Commissioners state that it is quite possible that females were driven from their young, and—

though turned away from the killing-grounds . . . . never afterwards found their way back to their original breeding-places, but either went off to sea or landed elsewhere,

they do not allege that the females so driven were *killed*. Messrs. J. Stanley-Brown and W. H. Williams are referred to as stating that no drives were made (in 1891) nearer to

one of the rookeries (Tolstoi) on and about which dead pups were specially observed by the British Commissioners (in 1891) than an estimated distance of *a quarter of a mile*. No evidence is given to show that the collection of the drives was limited to this distance from the rookery, nor is it stated that either of these gentlemen ever saw one of the drives of 1891 collected. Although the drives taken from the vicinity of Tolstoi are recorded as drives from "Middle Hill," it must be remembered that the slopes of Middle Hill and Tolstoi are continuous, and the drivers doubtless go where the seals they were instructed to procure could be obtained.

(*b.*) *Epidemic Disease.*—This, it is stated, is treated of in the United States Case. It is, however, in the place cited, merely stated that no sickness had been previously observed among the seals on the Pribyloff Islands, and that no dead adults were found. The British Commissioners themselves make a statement identical with the first (para. 32). As to the second, it does not necessarily follow that an epidemic fatal to young animals should be equally fatal in the case of adults.

United States Case, p. 216.

(*c.*) *Crushing of Pups in Stampedes.*—The assertion made by the United States that no evidence is given by the British Commissioners under this head is incorrect. The Commissioners quote statements from Bryant (Allen's Monograph) and Baron Nordenskjöld as to the facility with which stampedes may be caused, and their results. If further evidence as to the general timidity of the animals is required, this will be found in the British Counter-Case.

Page 90. British Commissioners' Report, paras. 331-333.

British Counter-Case, p. 113.

(*d.*) *Raids.*—The possibility of the occurrence of raids is not directly denied by the United States, though
116 statements are made for the purpose of minimizing their probability. It is further asserted that as the dead pups were found at several rookeries, several distinct raids would be required to account for their occurrence. It will be found, however, that large numbers of dead pups were discovered upon two rookeries only, both on St. Paul Island, as explained by the British Commissioners.

Pages 90, 91.

British Commissioners' Report, paras. 346, 347.

The facility with which raids might be made without any knowledge on the part of the guardians of the islands is illustrated, however, by the following facts referring to raids made in 1890 and 1891, when more than ordinary precautions against raids were taken.

The master of the "Challenge" and two of his crew describe at length a raid on St. George Island, of which nothing was known at the time it was made.

British Counter-Case, Appendix, vol. ii, pp. 182, 184.

One of the crew of the "Borealis" gives an account of the raid of that vessel on Zapadnie Rookery, St. Paul Island, while a cutter, whose lights could be seen, was anchored within 2 miles of them. The raid was successfully made without anything being known of it on the islands. The same rookery was raided in the autumn of 1890 by the "Adèle," and nothing was known of the raid by those on the islands.

Ibid., p. 183.

United States Counter-Case. Appendix, p. 379. British Counter Case, Appendix, vol. ii, pp. 182–184. See also United States Case, Appendix, vol. i, p. 503. Page 91.

Colonel Murray, in an affidavit, refers to the two first-mentioned raids as if the people on the islands had been cognizant of them at the time, and as if one vessel had been at once seized, and the other but a short time afterwards, but a reference to the passages cited will show that the raids mentioned only became known to the authorities, indirectly, months after their occurrence.

British Commissioners' Report, paras. 352, 353.

The bodies of pups examined by Dr. Ackerly were, as he admitted, too much decomposed for a correct autopsy. They were, further, those of pups which had died in September 1891 when no sealing-vessels remained in Behring Sea.

Ibid., paras. 353, 354.

The body of a pup found dead by the British Commissioners was examined by Dr. Günther. This was in good condition, preserved in alcohol. Dr. Günther was unable to decide whether the absence of food or the condition of respiratory organs was the primary cause leading to death.

United States Case, Appendix, vol. ii, p. 19.

Though it was at the request of Mr. Stanley-Brown that Dr. Ackerly's examination of the dead pups was made in 1891—and he was the Treasury Agent in charge of the Pribyloff Islands in 1892, and admits that in that 117 year the number of dead pups on Tolstoi rookery was beyond the normal—no record is found in his affidavit of an examination in 1892 of any of the dead pups by any authority. He seeks, however, to account for the unusual mortality in 1892 by an entirely novel explanation, in which he states that the pups in learning to swim had become exhausted, and, wandering off and lying down to rest, were overlooked by their mothers. A comparison of the 1892 photographs of Tolstoi rookery with those of 1891, show that the dead pups covered approximately the same area in both years, and were the explanation now offered by Mr. Stanley-Brown the true one, it would also account for the mortality among the young seals in 1891. Mr. Stanley-Brown, however, states that—

United States Counter-Case, p. 388.

Ibid., p. 389.

> the location and topographic character of this rookery have no counterpart elsewhere on the island;

British Counter-Case, Appendix, vol. i, p. 146.

but as dead pups were reported to have been found in large numbers on another rookery on St. Paul in 1891, and Mr. Macoun reports as many on Polavina rookery as on Tolstoi in 1892, Mr. Stanley-Brown's explanation can hardly be the true one.

A glance at the photographs which accompany the British Counter-Case, will show that the ground on which dead pups are to be seen on Tolstoi rookery extends along practically the whole front of that rookery, and at the time the photographs were taken nearly all the living seals, old and young, were behind this area, so that Mr. Stanley-Brown's statement that he has—

> seen mother seals go up the entire slope seeking their pups

may be taken as strictly true; but as they must have gone up this slope in any case, it can hardly be taken as evidence that the young ones had wandered away and so been lost. But if it be true that the pups on this part of the rookery-

ground, which *must* be passed over by all seals going to any other part of it—

> lie down to rest, and sleep and are overlooked by their mothers returning from the sea,

no better explanation could be given of the cause of the mortality among young seals on those parts of the rookeries, on some of which it is not as in this case necessary for the mothers to cross the ground upon which the dead pups occurred.

118 The statements as to a great decrease in the number of dead pups in 1892, as compared with 1891, made by United States, are in direct conflict with the observations of Mr. Macoun, and are contradicted also by the photographs taken in 1892 when compared with those of 1891.

Page 91. British Counter-Case, p. 213. Ibid., Appendix, vol. i, p. 146.

Mr. Stanley-Brown is quoted on this page of the United States Counter-Case as saying:

United States Counter-Case, p. 385.

> Dead pups were as conspicuous by their infrequency in 1892 as by their numerousness in 1891.

This gentleman, however, left the Pribyloff Islands on the 14th August, 1892.

Dead pups were first observed to be numerous and photographed on Tolstoi by Mr. Macoun 19th August; though photographs taken 8th August by Mr. Maynard show that large numbers of dead pups were lying on that rookery at that date.

British Counter-Case, Appendix, vol. i, p. 146.

Mr. Stanley-Brown admits that in 1892 the number of dead pups on this rookery was "beyond the normal." He devotes more than a page of his affidavit appended to the United States Counter-Case to endeavouring to explain it, in the manner already noticed.

United States Counter-Case, p. 388.

Colonel Murray, next quoted in the United States Counter-Case, says:

> I went over the rookeries carefully looking for dead pups. The largest number on any rookery occurred on Tolstoi, but here, as on the rookeries generally, but few of them were to be seen as compared with last year. This was the first time in my four seasons' residence on the islands that the number of dead pups was not greater than could be accounted for by natural causes.

Ibid., p. 378.

Colonel Murray gives no date. That his visit to Tolstoi was before the date of the departure of Mr. Stanley-Brown from the islands is evident, as Mr. Stanley-Brown, as above noted, describes the mortality as beyond the normal.

Mr. A. W. Lavender's statement as to the practical absence of dead pups on St. George in 1892 coincides with Mr. Macoun's observations. The same circumstance was particularly observed in the case of the similar mortality in 1891. And such mortality is referred to in none of the affidavits in Appendix to United States Case which refer to St. George Island in that year. This circumstance, in fact, strongly supports the belief that the mortality in neither year could have been due to the killing of mothers at sea.

Page 92. British Counter-Case, Appendix, vol. i, p. 146. British Counter-Case, p. 213. British Commissioners' Report, para. 346 *et seq.*

Page 92.

119 • Professor Evermann's statement, next quoted in the United States Counter-Case, as to the number of dead pups on Polavina rookery, refers to a visit made by him to that rookery early in the season (22nd July), in company with Mr. Macoun. His statement of number *seen at that time* practically agrees with that given by Mr. Macoun, who says—

British Counter-Case, Appendix, vol. i, p. 145.

Ibid., p. 146.

> Professor Evermann, ... who was with me at this time, and who counted 129 dead pups, thought, with me, that, if so many were to be seen at the outer edge of the rookery-ground, the whole number must be very great, and about a month later (20th August) I had ample proof that this was the case.

Ibid.

Mr. Macoun, however, further says that later in the season there were nearly or quite as many dead pups on Polavina rookery as on Tolstoi; and a native who was with him at the time of his visit told him that there were then more dead pups on Polavina than were on Tolstoi in 1891.

United States Counter-Case, pp. 264–271.

Professor Evermann made but this one visit to Polavina (22nd July). He visited Tolstoi rookery the following day (23rd July), and finally left St. Paul Island (24th July) more than two weeks before the time dead pups in considerable number were first noted on Tolstoi rookery.

Page 93.

The statement made in the United States Counter-Case to the effect that sealing-vessels were not present in Behring Sea in 1892, coincides with that specially adverted to in the British Counter-Case (p. 213); but it is maintained that the recurrence of a like mortality of pups in that year, absolutely confirms the deduction arrived at by the British Commissioners in 1891, that this could in no way be connected with pelagic sealing; and that it therefore cannot be interpreted in the manner now endeavoured to be done in the Counter-Case of the United States.

The alleged increase, next affirmed in the United States Counter-Case, in number of dead pups on the Commander Islands in late years, is not confirmed by Mr. Macoun's inquiries on these islands made in 1892. No such increase was admitted, by those on the islands, to have occurred, though pelagic sealing had then for the first time been practised to a considerable extent in the vicinity of these islands.

British Counter-Case, Appendix, vol. i, p. 148.

Pages 93, 94.

120 It is next stated in the United States Counter-Case that—

> the destructiveness of the Behring Sea catch, as compared with that in the North Pacific, is further shown by the relative sizes of such catches.

With the object of endeavouring to prove the assertion just quoted, attention is drawn to certain Tables contained in the Appendix to the United States Counter-Case, compiled from statistics given in the British Commissioners' Report. In these Tables the annual totals of skins are correct, and the proportions taken within and without Behring Sea are also correct,—the number of vessels is correctly given in one instance; but, as the average catch per vessel and per day for the total number of years has apparently been obtained by the erroneous method of averaging the

annual averages given by the Commissioners, none of these figures are correct. The following corrected Tables are therefore presented to take the place of those given in the United States Counter-Case:

United States Counter-Case, Appendix, p. 411.

Tables of Catches.

SPRING AND COAST CATCHES.

Year.	Number of Vessels.	Number of Skins.	Average Number per Vessel.	Average Number per Day.
1889	22	12,371	562	4.3
1890	29	21,390	737	5.4
1891	42	20,727	493	3.6
Totals and averages for three years..	93	54,488	586	4.3

BEHRING SEA CATCHES.

Year.	Number of Vessels.	Number of Skins.	Average Number per Vessel.	Average Number per Day.
1889	16	15,497	968	16.1
1890	23	18,165	789	13.1
1891	44	28,888	656	10.9
Totals and averages for three years..	83	62,550	753	12.5

121 But when it is attempted to deduce an average take per diem for each vessel from these figures, several important considerations are lost sight of. It is particularly to be noted that the conditions are such that the sealing voyages made to the south of the Strait of Fuca in the winter and early spring would not in themselves be remunerative. They are made because no other occupation offers for the sealing-vessels, while a certain advantage is to be gained by going early to sea, and thus securing the pick of the pelagic hunters. The diagram facing p. 22 of the British Commissioners' Report illustrates this very clearly. The circumstances are further explained in para. 583, and in para. 132 of the same Report, where it is shown that only the months of May and June are those in which large numbers of skins have so far usually been taken outside Behring Sea. Thus, a daily average based on the whole time during which a sealing-vessel is at sea, of which time some months are, as a rule, barely remunerative, does not afford any fair comparison of the number of seals taken in a given number of days without and within Behring Sea, nor of the "destructiveness" of the catch in the two areas. Unfortunately, the methods of conducting the industry have not enabled data to be obtained upon which a comparative Table of monthly catches of seals at sea can be drawn up.

Pages 93, 94.

United States Counter-Case, Appendix, pp. 246, 247.

The third proposition formulated by the United States for rebuttal is:

Page 94.

"3. *That the waste of seal life resulting from pelagic sealing is insignificant.*"

Pages 94, 95. Statements collected by the British Commissioners, and here referred to, which assert the enormous loss of seals by pelagic hunters, form part of a general discussion of losses.

British Commissioners, Report, pp. 82, 614. The British Commissioners explain that they have been at pains to collect and examine all the statements upon which a theory of great losses at sea have been based up to the date at which their Report was written. They have summarized these in para. 614 of their Report, thinking it better to trace such assertions back to their sources, rather than to depend on the rhetorical expressions of newspapers, &c., which afforded at the time the only other basis for the allegations of extraordinary losses at sea.

Page 95. 122 In proceeding to set out the testimony of persons who have actually engaged in pelagic sealing, the

British Commissioners' Report, paras. 615-626. Commissioners point out that the interest of such persons is a factor to be allowed for; but they also point out that the statements are given over the signatures of those making them, in a formal way, and are to be considered of "a much higher order of accuracy" than those before referred to. Advantage is, however, taken, in the Counter-Case presented by the United States, of this critical remark on the part of the British Commissioners, to designate the evidence as that of "interested parties."

The assertion is next made in the United States Counter-Case that—

> the Commissioners then present [on the subject of losses of seals at sea] a number of statements collected from inexperienced individuals.

A reference to the paragraphs of the Commissioners' Report thus alluded to by the United States will show how entirely incorrect the assertion as to "inexperience" is.

Page 96. It is scarcely necessary to pursue in detail the discussion of the facts respecting losses at sea, on this page of the United States Counter-Case. A few observations may, however, be made upon it.

In introducing their Table, showing the actual numerical losses of seals by a number of sealers, the British Commissioners do not say—

> an endeavour was *then* made to "elucidate the question," &c.

The statement made is as follows:

British Commissioners' Report, para. 627. It has been endeavoured, however, *still further* to elucidate the question here considered by tabulating all the well-authenticated statements referring to the actual number of fur-seals shot, and the proportion lost.

Again, the white hunters do not—

> affirm that they lose but 4 per cent. of the seals they kill.

This percentage is a calculation based on the numbers of seals shot and lost, or shot and recovered, as stated by the hunters.

The affirmations as to the *proportion* lost are contained in the preceding statements, with respect to the value of which a remark made in the opening lines of para. 627 refers.

123 The numerical statements here combined and tabulated represent nearly 10,000 seals, and no criterion

of similar accuracy had heretofore been offered on the subject under discussion. If any doubt remained, in view of this Table, as to the small percentage of seals actually lost, it is entirely removed by the still more extended Table of the same kind printed in the Appendix of the British Counter-Case.

British Counter-Case, Appendix, vol. ii, pp. 4, 5, 6.

It is here further stated in the United States Counter-Case that—

> the Table entitled "White Hunters" is averaged, while the Table entitled "Indian Hunters" is not, *for the obvious reason that these Indians appear to have lost twice as many seals as the whites*, which is in direct contradiction of the statements quoted in the Report, &c.

The suggestion as to the reason why the Table entitled "Indian Hunters" is not averaged is wholly incorrect. In the first place, it includes but 389 seals in all, being a number too small to afford an average of much value; while, of this number, 184 (taken by three witnesses) are stated to have been secured without any loss. But as a matter of fact, if a correct percentage be struck from this small Table, it will be found that in taking 389 seals not more than 14, or 3.6 per cent., were lost by sinking. The statement made in the United States Counter-Case that these Indians lost 8 out of every 100 has evidently been arrived at by adding together the few percentages that are given and dividing the total by the number of hunters, a method clearly erroneous.

Building upon this error, it is next attempted to show, that if Indians lose 8 (3.6) per cent. of the seals they kill, the white hunters lose five times as many, or 40 per cent. of the seals they kill. In support of this Captains Warren, Petit, and others, who say that Indians lose less than 1 per cent. while white hunters lose about 5 per cent., are quoted; but on referring to the affidavits made by these gentlemen, it will be seen that the loss by Indians mentioned by them, refers to seals killed with the spear, and such losses are not properly comparable with those resulting from the use of the gun. The Table of losses by Indians presented by the British Commissioners shows their loss when using shotguns.

British Case, Appendix, vol. iii, "United States No. 2 (1890)," p. 355; British Commissioners' Report, Appendix, p. 221.

Attention is then called by the United States, on the next page of their Counter-Case, to the circumstance that it is not definitely stated in each case by the British Commissioners whether the seals lost are those lost by sinking before recovery, when killed, or whether such as may have escaped after having been wounded are included. The available data were unfortunately not sufficient to determine this with accuracy in all cases, but in view of the statement advanced in the Case of the United States, to the effect that 66 per cent. of all seals killed are lost by sinking before recovery, the element of uncertainty thus introduced it too minute to be of importance. As it stands, the Table is sufficient to show that the statement made on this subject in the case of the United States is wholly incorrect.

Page 97.

124

United States Case, p. 196.

In later statements of sealers care has, however, been taken to separate the two sources of loss above alluded to, and in eliminating the loss due to the escape of wounded

British Counter-Case, Appendix, vol. ii, p. 6.

seals, that resulting from sinking alone becomes reduced (on a much larger number of seals) to about 3.1 per cent.

See remarks in British Counter-Case, p. 191.

A further reference is then made by the United States to the omission by the British Commissioners of any statistics respecting the loss of wounded seals which may escape capture. This is a subject upon which it is evidently impossible to obtain precise figures. The Commissioners' reference in this connection to the number of shots found in seals killed upon the Pribyloff Islands is next criticized. It is said:

Page 98.

> The notion that the carcass of every seal killed on the islands is searched for encysted bullets is sufficiently absurd, but it seems to be assumed in the reasoning of the Commissioners.

British Commissioners' Report, para. 628.

It will, however, be found, on referring to this allusion by the Commissioners, that allowance was made for the causes referred to by the United States.

British Counter-Case, pp. 192, 193.

In later statements published in connection with the British Counter-Case, care has been taken to obtain all information possible on the subject of seals shot and wounded, and which escape; and though, as above noted, it is a subject not susceptible of accurate numerical treatment, the number so lost is found to be exceedingly small.

Ibid., Appendix, vol. ii, pp. 11-13.

British Counter-Case, p. 191.

Still further, as stated in the British Counter-Case, it is not known that the loss of a certain proportion of wounded wild animals has ever previously been advanced as a reason for the disuse of the gun as a means of taking such animals.

125 Mr. Townsend, who was attached to the steamer "Corwin" during the summer of 1892, volunteered to act as seal-hunter, and is quoted in support of the assertion made by the United States, that the number of seals lost by wounding is great. His experiments as a "pelagic sealer" are too few and too unskilled to afford any useful evidence on the subject.

United States Counter-Case, Appendix, pp. 394, 210.

Ibid., p. 395.

A part, at least, of Mr. Townsend's loss by wounding is accounted for when he says, referring to the wounded seals which escaped:

> At first I blamed the ineffectual firing of the cartridges, but the cartridges proved all right as soon as I learned to aim at the head, and not at the animal as a whole.

Ibid., p. 208 *et seq.*

See British Counter-Case, Appendix, vol. i, p. 155.

An analysis of Captain Hooper's Report, and the Table accompanying it, shows that between the 27th July and the 10th August, when one of the seal-hunters carried by the "Corwin" was in Unalaska, and the other was unwell, Mr. Townsend and a quartermaster acted as hunters and took eighteen seals, losing four by sinking. These four were killed from the dingy, a small, clumsy ship's boat, in no way adapted for seal-hunting, in charge of a man with one day's experience as a seal hunter. Between the 10th August and the 21st August eighteen seals were captured by Hodgson the seal-hunter; in taking these he lost but one by sinking, of which he says: "That one I shot at a long distance, from 45 to 50 yards." Five other seals were taken during this time, but by whom is not stated, presumably by Mr. Townsend or the "quartermaster," and one

British Counter Case, Appendix, vol. ii, p. 134.

was lost by sinking. Captain Hooper then says: "Our total loss by sinking and wounding was 36 per cent." But in what way a knowledge was gained that any seals were seriously wounded, or wounded at all, and so *lost*, is not stated. No reference is made in the United States' Counter-Case to the sealing operations carried on by the United States ship "Rush" during the month of August, which resulted in the taking of seven seals, with none lost by sinking, though five were reported to have been wounded; how this was known is not stated.

United States Counter-Case Appendix, p. 234.

In view of such statements as those above noticed, the United States here sum up by denying—(1) that the percentage of female seals in the pelagic catch is not large;

Page 99.

(2) that pelagic sealing in Behring Sea is not as
126 destructive to seal life as in the North Pacific; and

(3) that the waste of life resulting from pelagic sealing is insignificant.

"SECOND."

"MATTERS UPON WHICH THE REPORT RELIES TO ESTABLISH CONCLUSIONS ADVANCED THEREIN, AND TO FORMULATE THE REGULATIONS RECOMMENDED, WHICH MATTERS HAVE NOT BEEN DEALT WITH IN THE CASE OF THE UNITED STATES."

"HABITS OF THE FUR-SEALS."

"1. *That the Alaskan Seal-herd has a definite winter habitat.*"

Page 100.

The title above quoted, given to this section of the United States Counter-Case, which is stated to be in discussion of a proposition conveyed in the Report of the British Commissioners, contains the expression "Alaskan seal-herd," which it has been pointed out in the British Counter Case is in its terms wholly misleading, and is not admitted as an appropriate name for the fur-seals of the eastern part of the North Pacific.

British Counter-Case, p. 119.

It is to be noted that the migration chart (No. 3) originally presented with the United States Case is incorrect, as is shown by the changes introduced in the new chart now substituted for the first in the Counter-Case of the United States. This latter chart approximates more nearly to that originally presented by the British Commissioners, but in the light of evidence obtained by these Commissioners and that afforded by additional facts set forth in the British Counter-Case, it still requires further correction.

It is particularly to be noted, that neither the migration charts produced by the United States is vouched for by any scientific or expert authority. They are said merely to be "compilations based on evidence," &c. Though both charts (with other maps contained in the United States Case and Counter-Case) bear the signature of T. C. Men-

denhall, Superintendent of the United States' Coast and Geodetic Survey, this is purely formal and is attached
Page 100. 127 as a matter of routine to maps issued from the Department in question, and not as in any way vouching the accuracy of the data from which the maps are compiled.

In this respect, the map prepared and presented by the British Commissoners differs widely. It is explained and adopted by them in their Report as correct to the best of their knowledge and belief. As the British Commissioners make themselves thus personally responsible for their map, the remarks made in the United States Counter-Case as to the absence of detailed evidence upon which the map is based are not justified.

Page 101. The peculiar method of argument employed in the United States Counter-Case, by which any deduction arrived at by the British Commissioners is characterized as a "theoretical proposition" or "position," and is discussed before the facts obtained are noticed, is again well exemplified on this page.

It is thus under this head, in the first place, asserted by the United States that—

> the *theoretical proposition* of an animal possessing two homes is contrary to what has been observed in respect to the habits of animals in general.

British Counter-Case, p. 152. As to this proposition, it is only necessary to refer to the interesting statement on this subject made by Dr. Merriam, one of the United States Commissioners, writing as a naturalist; and it is confidently affirmed that no unprejudiced naturalist will be found to deny the existence of two "homes" in the case of a regularly migratory animal.

Dr. Merriam's remarks, here particularly referred to, relate to migratory birds, the analogy between which and the fur-seal has been clearly pointed out by Professor
"Forum," November, 1889. Angell. If the "home" of any animal be merely its breeding resort, any rights which may be supposed to flow from the possession of such "home" would rest in the case of many of the migratory birds, (and particularly of the economically important water-fowl) of North America, exclusively in Canada.

If, again, the term "home" be considered as equivalent to that of "habitat," as technically employed by naturalists, it will be found that the most trustworthy and eminent authorities are united in defining the habitat of a
128 migratory animal as including the whole of the area over which it normally ranges.

The statement made by the British Commissioners, as the result of their investigations, in respect to the summer and winter "homes" of the fur-seal, is next found fault with because the names of their informants are not specifically detailed. A reference to the British Commis-
British Commissioners' Report, paras. 175-187. sioners' Report will show that they have given, in what is believed to be sufficiently great detail, an account of the evidence upon which the "winter home" of the fur seals has been defined by them. It is not true that the names of their informants are not given. A number of these

informants are named, and the detailed statements of some of them are included in the Appendix to the Report. The facts, ascertained in interviews with natives along the coast, are given in abstract.

On the part of Great Britain, no such imputations are made respecting the basis of the migration-maps offered in the Case and Counter-Case of the United States. It is in fact believed that the errors occurring in the first, and those which still remain in the second, editions of this map are due merely to imperfect information, and a reference to the data upon which these maps are constructed fully bears out this belief.

How the statement can be made on this page of the United States Counter-Case, that the British Commissioners "entirely overlooked" the important fact that full-grown bull seals are not found to the south of the 50th parallel, is inexplicable. This fact was ascertained as the result of their own investigations. It is clearly set forth in para. 193 of their Report, and characterized there as a "noteworthy and interesting fact."

The further statement that the Commissioners do not anywhere state—

> that they ever heard of a full-grown male below the 56th parallel, the assumed northern limit of the winter habitat which they have created,

is broadly incorrect, as a reference to the Report will show. British Commissioners' Report, paras. 172-180.

As the line drawn on the new migration-chart now offered by the United States to represent the southern limit of the range of full-grown males is not supported by any evidence, it appears unnecessary to follow the argument based on this, and on the erroneous statement just referred to; but it may be pointed out, that even on the incorrect assumption made, *i. e.*, that full-grown bulls are seldom seen south of Baranoff Island, and that the "winter home," referred to by the British Commissioners, is therefore not that of the full-grown males: Page 102. 129 Page 102.

1. That this does not assist the further assertion made to depend on it that such males have no "home" but the Pribyloff Islands; and

2. That whatever rights may flow from position, proximity of territory, or food consumed by the fur-seals, may be held equally on animals of either sex or any age, the *number* being the principal consideration, particularly in respect to the consumption of food fishes.

Stress is laid in the United States Counter-Case on the fact that sealing is conducted to a certain extent southward along the North American coast, as far as California, and it appears to be considered that this fact invalidates the migration-map printed in the British Commissioners' Report. An examination of this map and of the Report will, however, show that it has been fully recognized, and was considered and particularly mentioned by the Commissioners. It was very clearly not the purpose of the Commissioners in this map to indicate the whole vast region of ocean which might at any time be resorted to by any fur-seals, but to distinguish and make plain, as the facts Pages 102, 103. British Commissioners' Report, Map No. II, and paras. 582, 596.

obtained by them enabled them to do, the principal resorts of the fur-seal at various seasons, and the main routes covered during its migration. Further evidence since obtained tends fully to confirm these main facts as represented in the migration-map of the British Commissioners.

British Counter-Case, Appendix, vol. ii, pp. 43-139.

United States Case, p. 129.

It will further be remembered, that in the Case of the United States, evidence is brought forward to show that the Californian fur-seal is an animal wholly different from the northern fur-seal proper; while the British Commissioners, though not aware of the conclusions at which Professor Allen was about to arrive on this subject, have themselves independently recorded their belief that the fur-seals noted as breeding on the Californian coast could not well have taken part in the main migration.

Ibid., Appendix, vol. i, p. 406.

British Commissioners' Report, paras. 190, 191.

Page 104.

The statement made on this page of the United States Counter-Case, and based on evidence quoted by the British Commissioners, that Captains Kelly and Petit have followed the seals "along" the British Columbian coast, has

Page 104.

130 nothing to do with the subject under discussion, for it is fully understood and explained in the British Commissioners' Report that a northward movement sets in among the seals in the spring.

The further statement that—

> the distribution of the Alaskan seal-herd is much more scattered during the winter months than is implied by the Report, and the range of position of the herd is much further south and west than appears on the Commissioners' chart of migration,

shows merely a misconception of the nature of these statements and of that chart. No chart, map, or diagram showing the result of observations of natural phenomena, such as those of migration, winds, rainfall, &c., in a general way, is so framed as to include all exceptional cases.

It is of interest to note, by the statements made on this page of the Counter-Case, that the United States—twenty-five years after having come into possession of Alaska—have in 1892 for the first time taken some measures to ascertain the migration-routes of the fur-seal; and though the investigations thus carried out by Captain Hooper, in a single vessel, do not afford evidence of a character comparable with that obtained by the British Commissioners from the numerous pelagic sealers and the native peoples inhabiting the coasts, they, nevertheless, possess some points of interest.

These investigations are referred to in a foot-note to this page of the United States Counter-Case, and it will be found on consulting Captain Hooper's Report, in the Appendix, that wherever he speaks of actual observations, his statements are in accord with those of the British Commissioners. He thus writes:

United States Counter-Case, Appendix, pp. 232, 370.

> But a *small part* of the entire herd goes to the coasts of California and Oregon. *Many seals reach the coast further north*, some of them coming out through the passes, but going no doubt direct to *the coast of Washington, and even further north*. In 1886, during a passage in the United States revenue-steamer "Rush," from Puget Sound to Unalaska, where we arrived on the 19th January, *I saw fur-seals nearly every day*, the vessel having passed through the herd then on its migration from the passes to the coast, and extending *entirely across the Pacific Ocean*.

Captain Hooper does not state whether the voyage referred to was made outside or inside Vancouver
131 and the Queen Charlotte Islands, but in either case his observations accord perfectly with those depended on by the British Commissioners. Page 104.

He further states, in two places, that the arrival (or appearance) of seals upon the coast is directly related to that of the coming of the smelts, herring, and ulachan. This statement may be compared with those made in the British Commissioners' Report, and in the British Counter-Case, with which it fully accords. United States Counter-Case, Appendix, pp. 232, 370. British Commissioners' Report, paras. 209, 224, 228. British Counter-Case, p. 152.

As the statements made by Captain Hooper appear to be relied upon by the United States in connection with that part of the migration-route of the fur-seal which lies to the south of the Aleutian Islands, and to have been employed in the construction of the revised migration-map presented with their Counter-Case, it may be interesting to note that Captain Hooper in 1892 left Unalaska on the 10th November, and arrived in San Francisco some time before the 21st November, when his Report was made. On the passage he saw but two seals. United States Counter-Case, Appendix, pp. 228, 238.

Captain Ferguson is, however, also quoted to express his belief that there must be an "immense feeding-ground" of fur-seals between latitude 40° and 42° north and longitude 172° and 135° west. He saw no fur-seals there himself, but quotes the reports of vessels (not named) which are stated to have seen seals in this region. From the evidence printed in the British Counter-Case, it is very probable that Captain Ferguson may be correct in his conjecture that a certain or even a considerable number of fur-seals may often be found in the region specified, but this in no way affects the general facts as to the migration of the main bodies of the seals of the North Pacific. So far as it goes, it assists to bear out the evidence relating to the intermingling of the seals of both sides of that ocean during the winter months, and also the statements as to the essentially pelagic habits of the seals. Page 105. British Counter-Case, pp. 137, 138.

The "data collected and mentioned above" are those just referred to, and their extremely scanty character fully justifies the doubts expressed as to the trustworthiness of some of the indications of the new version of a migration-map presented with the Counter-Case of the United States.

It must be explained, that the criticism thus made
132 is not directed to all the indications of the map; but it is confidently maintained that no substantial evidence has been adduced to verify that part of these indications which shows the fur-seals, after having left the territory of the United States on the Pribyloff Islands, navigating in a body directly to that part of the west coast of North America which is comprised in the territory of the same Power to the south of the Canadian coast.

It may also be noted, that no attempt is made on the map in question to show the general distribution of the seals in Behring Sea and along the Aleutian chain during the summer months.

In this connection it is further important to observe, that on another map, which purports to give details respecting

seals observed by cruizers in Behring Sea in 1892, an important error has occurred, in consequence of which seals seen in three places *west* of the 180th meridian have been placed at corresponding distances *east* of that meridian (or in west instead of east longitude). The error is more important having regard to the small number of cruises made to the west of this meridian. The observations referred to are those of the "Yorktown." No notes are given respecting cruises made to the west of the 180th meridian in the same year by two other United States' vessels, the "Ranger" and the "Mohican."

The logs given in the Appendix (pp. 400–408) cover but a small part of the cruises shown on Chart IV of the United States Counter-Case.

United States Counter-Case, Appendix, p. 228.

The eighty affidavits of natives collected by Captain Hooper in the Aleutian Islands, while engaged in investigating the range of the fur-seal, though these would be of material interest, have not been produced by the United States.

"2. *That the Alaskan Seal-herd has changed its habits as a result of disturbance on the breeding-islands and of pelagic sealing.*"

Page 106.

As in previous cases, the discussion of the evidence and conclusions of the British Commissioners given under this head is introduced by imputing a motive to the Commissioners. They are represented as assuming a position, and thereafter endeavouring to support it. The evidence and facts adduced by them are, however, fortunately, not thus affected.

133 In dealing with the subject described in the heading above quoted, which nearly corresponds with that discussed by the British Commissioners under their chapter, "(O.) *Changes in Habits of the Fur-seal in recent years*," a selection is made of some of the points taken up in that chapter, for reply, while others are passed over without notice.

The subject is further subdivided in the United States Counter-Case into two subordinate sections, denoted (*a*) and (*b*) respectively. The first of these includes mention of the Table of catches per man and boat given on p. 74 of the Commissioners' Report, of the degree of connection of seals found in Behring Sea with the breeding islands, of the increased pelagic nature of the seals owing to disturbance, and, singularly enough, of the question of the taking of "stagey" seals at sea, which is referred to in another part of the British Commissioners' Report.

British Commissioners' Report, para. 281.

The Table just referred to, constitutes only a part of the evidence showing that no decrease in seals has been observed at sea in late years. In paras. 403–405 of the British Commissioners' Report, abstracts of statements covering much experience, and a considerable number of years, are given. Neither is any mention made by the United States of the relative effects of the increasing wariness of the seals and growing experience of the hunters.

On both these subjects much additional evidence is now available, and this is entirely confirmatory of the general statements made by the Commissioners. British Counter-Case, p. 173; and Appendix, vol. ii, pp. 29–32, 43–166.

In respect to the Table, the complaint is made that it includes but five years—1887–91. But, for all practical purposes, these later years are the most important, and offer the best test of the matter under discussion. Apart from the changes introduced by increasing wariness of seals and growing skill of hunters, other important changes in methods have occurred concurrently with the growth of pelagic sealing. The number of vessels in these years was also larger; and for this reason, and those above alluded to, the years in question appear to afford data of a more nearly comparable character. Neither could it be known to the Commissioners that the United States would in their Case fix on the year 1885 as being that of the beginning of a decrease in the number of seals. As the data, so far as they exist, for the whole period of pelagic sealing, are given in the Appendix to the Report, the suggestion of a wish to conceal the facts for 1885 and 1886 has no validity.

134 Page 106.

As the number of boats engaged in the fishing in 1885 is not known, it was naturally impossible to present the average number of seals per boat taken in that year, while in 1886 several of the sealing-vessels were seized in Behring Sea, and as there was no record of the number of seals taken by such vessels there, and any averages based on the total catch of the fleet must be inaccurate, they were omitted. Page 107. British Commissioners' Report, Appendix p. 209.

A singular train of reasoning is next entered into in the United States Counter-Case to justify the production of new Tables, based on the British Commissioners' figures; but in which these figures are separated and so manipulated as to show a decreasing "coast catch," with an increasing catch in Behring Sea. If the statements urged in the above argument—to the effect that the sealers only in later years became conversant with all the resorts of the seals—are correct, they afford an excellent reason for the restriction of the Commissioners' Table to these later years. Page 108.

In the Table printed on p. 411 of the United States Counter-Case, 3,565 is given as the number of skins taken on the "coast" in 1891, and this is made to correspond with the "spring" catch of earlier years. The fact that fourteen vessels are shown in the British Commissioners' Table to have transhipped their skins at Sand Point, but to have made no return for the coast catch, is ignored in the preparation of the Table in the United States Counter-Case. These vessels had taken 6,364 skins before they reached Sand Point, a great many of which were taken on the "lower" or southern coast, and if this number were determinable it should be added to the number, 3,565, used in the Table appended to the United States Counter-Case. The fact is that many sealing-vessels, after a short cruize to the southward of Cape Flattery, return to Victoria to refit, and there discharge their skins. These vessels continue sealing along the British Columbia coast, and that British Commissioners' Report, p. 205.

part of their catch taken on this portion of the coast should also be included under the heading "spring catch" or "lower coast" catch in the Table referred to. It is thus evi-

Page 108. 135 dent that no proximately accurate separation can be made of the "coast" and "spring" catches, and that any Table prepared for the purpose of showing the average catch per vessel or per boat, should include all the seals known to have been taken south of the Aleutian Islands. This has been done in the Table given below. Accuracy is claimed for the years 1889, 1890, and 1891 only, but in order to show how misleading the Table printed in the United States Case is, the years 1886, 1887, and 1888 have also been included in the Table.

The explanation offered for the inclusion of but one part of the "coast catch" in the Table presented in the United States Counter-Case (p. 411) is that "prior to 1889 the so-called 'coast catch' did not include skins taken north of Vancouver Island, and it therefore corresponds to the 'spring catch' in the Table for 1889, and following years." The British Commissioners are quoted as the authority for this statement; but on turning to their Report (p. 211), it will be found that what they really say is very different from what is attributed to them:

> The Behring Sea catch for this [1888] and previous years includes a certain number of skins taken on the coast of British Columbia, to the north of Vancouver Island, the schooners having no opportunity of landing the skins before entering Behring Sea.

It is thus evident that the exact number of skins taken on the "coast" prior to 1889 cannot be determined, but an approximate estimate may be obtained by adding together the total of the catches made on the coast in 1889, 1890, and 1891, and ascertaining what proportion they represent of the total catch for these years. It is by this means found that the number of seals taken on the "coast" represents 46.6 of the total number taken in 1889, 1890, and 1891.

In the Table given below 46.6 per cent. of the total catch for each of the years preceding 1889 is assumed to have been taken on the coast, this being the best available means of forming an estimate for these years:

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Year.	Number of Vessels.	Total Catch.	Coast Catch.	Average per Vessel.	Number of Boats and Canoes.	Average per Boat or Canoe.
1886	16	24,344	11,344	709	101	113.3
1887	17	20,266	9,444	555	123	76.8
1888	20	24,329	11,338	567	165	68.7
1889	22	27,868	12,371	562	179	69.1
1890	30	39,547	21,390	713	246	86.9
1891	43	49,615	20,727	482	327	63.4

Page 109. The statement is made on this page of the United States Counter-Case, that the British Commissioners—

> assert that the seals found in Behring Sea are not seals which have temporarily left the rookeries to feed, but are practically independent pelagic herds.

On reading the paragraph of the British Commissioners' Report referred to (para. 219), it will be found that the Commissioners' statement is not intended to apply to *all* the seals in Behring Sea, and further that the concluding expression is not that employed above, but—

Compare also para. 214.

practically independent pelagic schools of a diffuse kind,

an expression conveying a different meaning.

Moreover, the mention made in this particular paragraph of the Commissioners' Report, is one only incidental to a discussion of the possible bearings of the direction and force of the wind on the direction of travel of the seals in the eastern part of Behring Sea.

Neither is it true, as is next asserted, that the results of these observations are the only evidence offered on the independence of a large number of the seals in Behring Sea of the breeding-islands, as a perusal of paras. 209–222 of the Commissioners' Report will show.* Additional facts, with the same meaning, have subsequently been observed by Mr. Macoun.

British Counter-Case, Appendix, vol. i, p. 145.

It is further stated in the United States Counter-Case, that the "alleged observations" of the direction of the wind "*are not given, and, even if true*, are quite too slender to furnish a foundation for any conclusion." It is true that the detailed logs transmitted to the Meteorological
137 Department of Canada for analysis are not printed in full in the Report, but synopses of the results obtained by such analysis are given on the face of the maps to which they refer. If the United States seriously entertain doubts as to the existence of the observations, they can be submitted for their inspection.

Page 109.

British Commissioners' Report, Maps III and IV.

The assertion next made, that the British Commissioners advance no proof of the increased pelagic nature of the seal, is incorrect, as will be found on examining paras. 397, 412, 424, 183–185, 205–207 of their Report. The fact, stated by them (para. 402), that no decrease has been noted in the number of seals at sea, though the number frequenting the islands has decreased, is of itself sufficient proof of the increased pelagic nature of the seal.

As to the non-occurrence of "stagey" or "shedding" seals at sea, the Commissioners may be assumed to have based their statement on the best evidence available to them. Its nature is explained in paras. 281, 631, 632 of their Report. More complete evidence will be found on this point in the statements appended to the British Counter-Case.

Pages 106, 107.

British Counter-Case, Appendix, vol. ii, p. 43 *et seq.*

It is a fact generally recognized, that fur-bearing animals living much in the water, such for instance as the otter and beaver, shed their pelage by degrees, and not so markedly at any one time as to seriously affect the value of their skins. The same fact is believed to explain the absence of "stagey" fur-seals at sea, while the creation of a markedly

*See also Captain Bryant, in "Monograph of North American Pinnipeds," p. 411, quoted in British Counter-Case, Appendix, vol. i, p. 126; and Veniaminov in Elliott, Census Report, p. 141.

British Commissioners' Report, para. 134.

"stagey" condition is supposed by the British Commissioners to occur during, and in consequence of, the continued resort of a portion of the seals to the land. It is gratifying to observe that in this one instance the explanation offered by the British Commissioners is accepted as correct; but the ensuing deduction, that "a seal must, therefore, of necessity be on the islands each year at some period," is a *non sequitur* of the most apparent kind. The proof is, in fact, exactly to the opposite effect, for if all the seals must resort to the islands, and must remain there during the "stagey" season, then no seals should be found at sea during that season. The "stagey" season begins about the middle of August and lasts for some six weeks. Thus, according to the argument advanced by the United States, no seals should be found at sea from the middle of August up to and after the 15th September. This is, however, wholly negatived by the known facts relating to pelagic sealing.

British Commissioners' Report, para. 281.

Elliott, Census Report, p. 46.

Bryant in "Monograph of North American Pinnipeds," p. 410.

Pages 106, 107.

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But not content with the clearly cut position just outlined, the United States further endeavour (and in opposition to it), to prove that "stagey" skins in large quantity *are* taken at sea. Affidavits on this subject are produced from Messrs. C. Behlow, W. Preiss, and W. E. Martin. Messrs. Behlow and Preiss say that all skins taken in Behring Sea after about the 10th August are "stagey" and "almost unmerchantable." The statement thus made is so sweeping and so entirely in opposition to other evidence as to defeat its object. Sealers would not remain in Behring Sea after the 10th August for the purpose of obtaining, at much cost and labour, skins "almost unmerchantable." Mr. Martin is more judicious; he speaks only of a certain percentage of "stagey" skins, without stating any amount.

See United States Counter-Case, Appendix, pp. 357, 376, 384.

Page 109.

The second section (*b*) of this part of the argument in the United States Counter-Case is devoted to the denunciation of a heresy expressed as follows in that Counter-Case, and attributed to the British Commissioners:

> That the location of the breeding rookeries is dependent solely upon the fact that the seals while there are not disturbed by man.

It will be found, however, on referring to the British Commissioners' Report, that the statement here made is not theirs, but one embodied for the purposes of attack in the United States Counter-Case itself.

British Commissioners' Report, paras. 31, 247-248, 400.

British Counter-Case, p. 146.

The Commissioners believe the freedom from disturbance and attack to be the principal or ruling cause, but not the *sole* cause, of the resort of seals to any particular place at the breeding season. The subject is, moreover, further treated in the British Counter-Case.

United States Counter-Case, pp. 145-148.

It is not, however, in the Counter-Case of the United States attempted directly to controvert the above statement, even in the form in which it is presented in that document; but in discussing it, attention is turned to the records which exist of former breeding-places of the fur-seals in the vicinity of the North American coast to the south of the Aleutian Islands. Reference is made to some of the statements on this subject con

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tained in the Report of the British Commissioners, and it is then stated that the Commissioners have failed to authenticate these. This alleged "failure" must of course remain a matter for decision on the evidence produced, but the additional information obtained in 1892 respecting Haycock and other islands and rocks, with that relating to the taking of female seals in milk off various parts of the British Columbian and Alaskan coasts to the south of the Aleutian Islands, go far to reinforce the already strong body of evidence on this point adduced by the British Commissioners.

British Commissioners' Report, paras. 447-449. 523, 524. See also para. 424.

British Counter-Case, Appendix, vol. i, pp. 135, 136.

Attention is then, in the United States Counter-Case, directed to the statement made by the British Commissioners, on the basis of information gained by them on the Commander Islands and at Petropavlovsky, as to the formation or attempted formation of new rookeries at various places on the Asiatic coast. Mr. Malonavonski is quoted as having visited *one* such reported rookery on the Kamtschatka coast, and as having found the animals there to be sea-lions and not fur-seals. Upon this single inconclusive statement the following remark is made:

Page 110. United States Counter-Case, Appendix, p. 376.

> If all the incipient breeding rookeries alleged to exist on the Asiatic coast were examined, doubtless they would be found to be similar to the one above noted.

Mr. Grebnitzky is cited to the effect that he thinks it to be wholly improbable that the Commander Island seals visit any other land, but it will be observed that though the United States took pains to obtain a written statement from this gentleman, for the purpose of counteracting his statements as quoted in the British Commissioners' Report, he has not in this document contradicted his specific reference to the formation of a new fur-seal rookery on the Kamtschatka coast.

Ibid., p. 363.

Ibid., p. 362. British Commissioners' Report, para. 519.

The great importance evidently attached by the United States to the denial of the evidence showing that the fur-seal on the Asiatic coasts has sought and found new breeding-places, evidently depends on the circumstance that this evidence tends to substantiate the less complete details respecting the existence of such breeding-places (other than the Pribyloff Islands) on the coast of North America.

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On the strength of the above imperfect discussion, and the inconclusive negations above outlined, it is then denied on the part of the United States that the—

> Alaskan seals have any other home than the Pribyloff Islands, and that, even if constantly disturbed by man while on the rookeries they would seek a new habitation.

The denial above summarized is not only contrary to all natural facts, but bristles with ambiguities. If the term "Alaskan seals" means only the seals breeding on the Pribyloff Islands, it may readily be admitted that they have no other breeding-place. If the breeding-place is the only "home" of such seals, it of course follows that this "home" must be on the Pribyloff Islands. But the use made of the term "home" is a purely conventional one, and thus, if the territorial possession of the "home" is supposed to imply

some proprietary right in the seals themselves, it is a wholly misleading one. What "habitation," as distinguished from "home," may imply is not explained.

Page 111. British Counter-Case, Appendix, vol. ii, pp. 89, 113.

The reference next made on this page of the United States Counter-Case to Robben Island and its rookeries, renders it appropriate to point out that in the very years in which this island was being continuously harassed by raids, the seals began to form new rookeries in other suitable places. It is of course impossible to state that they were actually the same fur seals which had formerly resorted to Robben Island, but the presumption is in favour of that belief.

Ibid., pp. 34, 35.

In 1892, evidence of the most conclusive kind possible has been obtained on this particular subject, relating to the formation or attempted formation of new rookeries on Moo-shir Rocks, Raikoke Island, and Shed-noi Island of the Kurile group, Bittern Rocks off the north-west coast of Nipon Island, and on the Island of St. Iona in Okhotsk Sea. It is thus no longer necessary to deal with the discussion of abstract propositions on this subject of the change of breeding-places, to which we are invited in the Counter-Case of the United States.

141 Occasion is next taken on this page of the United States Counter-Case, to contradict or modify the evidence of one witness out of three quoted in para. 422 of the British Commissioners' Report, in which it is stated that, concurrently with the beginning of the United States control of the Pribyloff Islands (and presumably because of the excessive slaughter occurring at that time), fur-seals were found in more than usual abundance on the coast of British Columbia; the evidence adduced being such as to show the injurious effect of disturbance on the breeding-islands.

United States Counter-Case, Appendix, p. 413.

The matter has been considered to be of so great importance by the United States, that Professor J. A. Allen has written a special letter to the United States Secretary of State, to say that the year should have been 1870, and not 1869 (as stated in his Monograph), in which seals were specially abundant on this coast. Instead of weakening the force of the Commissioners' statement on this point, the correction given strengthens it, and fully accords with the evidence obtained by the Commissioners from other sources. There is no reason to suppose that the excessive disturbance on the breeding islands, which reached its maximum in 1868, was confined in its effect to the next year. The diagram given by the Commissioners, in fact shows that the greatly increased Indian catches along the British Columbian coast actually occurred in 1870 and 1871.

British Commissioners' Report, Diagram No. IV. See also paras. 44, 809.

No. 2.

Remarks on the United States Evidence.

Any detailed criticism on the United States evidence must, of necessity, be reserved for oral argument, but there are some observations bearing upon the character and reliability of such evidence which it is deemed proper here to put before the Arbitrators.

In the first place, it must be pointed out that the assertions made in respect to seal life and other connected subjects in the United States Case, are entirely based on very recent affidavits, or on papers which have been specially obtained or prepared in connection with the present discussion, and which are now produced for the first time. Further, that many of these are derived from persons who formerly occupied official positions in connection with the management or supervision of the Pribyloff Islands under the United States Government control, and who were the authors of official Reports and other writings on the condition of the islands; but that such earlier and public official Reports are not now referred to in the United States Case. The following Table shows the names of the Agents and Officials whose sworn evidence appears in the United States Appendices, and which also shows their previous Reports and writings:

144 Names of Witnesses.	Reports, Evidence, or published Writings, formerly made by Witnesses.	Where Reports referred to in United States Case.	Date of last Visit to Pribyloff Islands.
Ch. Bryant	Sen., 41st Cong., 2nd Sess., Ex. Doc. No. 32; H. R., 41st Cong., 3rd Sess., Ex. Doc. No. 122; H. R., 42nd Cong., 2nd Sess., Ex. Doc. No. 20; H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83; "Monograph of North American Pinnipeds," p. 381 *et seq.*; "On Eared Seals," p. 381.		1877
Stephen N. Buynitsky	H. R., 41st Cong., 3rd Sess., Ex. Doc. No. 122, p. 5; H. R., Ex. Doc., 44th Cong., 1st Sess., No. 83; H. R., 50th Cong., 2nd Sess., Rep. No. 3883, p. 1.		1872
William H. Dall	"Alaska and its Resources," Chap. VI.		1880
Captain M. A. Healy			1891
John A. Henriquez			1869
Abial P. Loud			1889
H. H. McIntyre	Sen., 41st Cong., 2nd Sess., Ex. Doc. No. 36; H. R., 50th Cong., 2nd Sess., Rep. No. 3883, p. 116.		1889
John M. Morton			1878
Jacob H. Moulton	H. R., 50th Cong., 2nd Sess., Rep. No. 3883, p. 250.		1884
Joseph Murray	Sen., 51st Cong., 2nd Sess., Ex. Doc. No. 49		1891
S. R. Nettleton	Sen., 51st Cong., 2nd Sess., Ex. Doc. No. 49		1891
H. G. Otis			1881
Benjamin F. Scribner			1880
William H. Williams			1891
Milton Barnes			
Henry A. Glidden	H. R., 50th Cong., 2nd Sess., Rep. No. 3883, p. 17.		1885
Ch. J. Goff	Sen., 51st Cong., 2nd Sess., Ex. Doc. No. 49; letter to Mr. Windom, British Counter-Case, App., vol. i, pp. 84, 85.	United States Case, p. 153.	1890
S. Falconer	H. R., 42nd Cong., 2nd Sess., Ex. Doc. No. 20, p. 2; H. R., 44th Cong., 1st Sess., Ex. Doc. No. 83.		1876
Louis Kimmel	H. R., 50th Cong., 2nd Sess., Rep. No. 3883, p. 267.		1883
T. F. Ryan	Ibid., p. 211		1886
W. B. Taylor	Ibid., p. 41		1881
George Wardman	Ibid., p. 29		1885

It is also to be remarked that although the above-named gentlemen had not since the dates above mentioned (in some cases fifteen to twenty years ago) visited the Pribyloff Islands, and had not, therefore, any further personal information on the subject, yet the opinions expressed in the testimony now put forward in many instances differ materially from that formerly expressed by them in their official Reports, as the following few examples will show:

145 Stephen N. Buynitsky.—As to the existence of fish near the Pribyloffs:

They (the natives) subsist mostly on cod and halibut, and every description of fish they can find. They dry and preserve it for winter.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 12.)

At the time I was on the islands I do not think there were any fish at all within 3 miles of the islands, and that the seals to feed had to go farther than that from land. The belief is founded on statements made me by natives on the islands, and also from the fact that fresh fish were seldom eaten upon the islands.—(United States Case, Appendix II, p. 21.)

H. H. McIntyre.—As to the movements of seals while on the islands:

The fact is that the bachelor seals may be found to-day upon a certain rookery, and at another time upon another place. The result is the same animals, in many instances, have been counted two or three times.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 116.)

Yet their (the seals') habits are so well defined and unvarying that it is an easy matter to determine whether they increase or decrease from year to year, because they always occupy the same portions of certain beaches, and simply expand or contract the boundaries of the rookeries as they become more or less numerous.—(United States Case, vol. ii, p. 48.)

As to the scarcity of bulls:

There are at present (1888), in my opinion, too few bull seals to keep the rookeries up to their best condition.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 117.)

When we are left only exactly the number of bulls we need, and a few even of these are killed, it completely upsets our calculations, with the result of leaving too few of this class of animals to secure the full productiveness of the rookeries.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 130.)

While I was located upon the said islands there was at all times a greater number of adult male seals than was necessary to fertilize the females who hauled up on said rookeries, and there was no time when there were not vigorous bulls on the rookeries who were unable to obtain female consorts.—(United States Case, vol. ii, p. 45.)

Henry A. Glidden.—As to raids and sales of skins:

Q. I would ask whether there are not trading-vessels which buy skins?—A. Yes, Sir, and steal skins; that is the great trouble we had, to watch marauders. That was more trouble than anything else.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 26.)

Raids on the rookeries by marauders did not, while I was on the islands, amount to anything, and certainly seal life here was not affected to any extent by such incursions. I only knew of one raid upon St. Paul Island while I was there.—(United States Case, Appendix, vol. ii, p. 111.)

J. H. Moulton.—As to the increase of seals on islands:

I think during the first five years (1877-82) I was there there was an increase, and during the last three years (1883-85) there was no increase.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 255.)

While on St. Paul Island (1881-84) I do not think the number of seals increased, and in the last year (1884) I think there was a slight decrease.—(United States Case, Appendix, vol, ii, p. 71.)

Charles A. Goff.—As to driving:

We closed the season by turning away 86 per cent. [of the seals driven], a fact which proves to every impartial mind

A few seals are injured by redriving (often conflicted with over-driving, and sometimes so called), but the number so

that we were redriving the yearlings, and, considering the number of skins obtained, that it was impossible to secure the number allowed by the lease; that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries, to the detriment of the lessees, natives, and the Government.—(Senate, 50th Congress, 2nd Session, Ex. Doc. No. 90, p. 5.)

injured is inconsiderable, and could have no appreciable effect upon seal life through destroying the virility of the male.—(United States Case, Appendix, vol. ii, p. 113.)

146 As to causes of decrease:

It is evident that the many preying evils upon seal life, the killing of the seals in the Pacific Ocean along the Aleutian Islands, and as they come through the passes to the Behring Sea, by pirates in these waters, and the indiscriminate slaughter upon the islands, regardless of the future life of the breeding rookeries, have at last, with their combined destructive power, reduced these rookeries to their present impoverished condition.—(Senate, 50th Congress, 2nd Session, Ex. Doc. No. 90, p. 5.)

The prosperity of these world-renowned rookeries is fast fading away under the present annual catch allowed by law, and this indiscreet slaughter now being waged in these waters will only hasten the end of the fur-seals of the Pribyloff Islands.—(Letter from Mr. Goff to Mr. Windom, dated St. Paul Island, Alaska, 31st July, 1889.)

I believe that the sole cause of the decrease is pelagic sealing, which, from reliable information, I understand to have increased greatly since 1884 or 1885.—(United States Case, Appendix, vol. ii, p. 112.)

W. B. Taylor.—As to raids:

These vessels will take occasion to hang around the islands, and when there is a heavy fog to go to the rookeries very often. . . . . As it is to-day, these vessels come and kill 5,000, 10,000, and 15,000 seals every year.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 54.)

There was but one raid on the rookeries while I was there, and that took place on Otter Island.—(United States Case, vol. ii, p. 177.)

George Wardman.—As to increase in number of seals:

After having told the Committee in 1888 that he had measured all the rookeries carefully, Wardman was asked—

Q. Do you put it [the number of seals] at the same numbers annually?—A. About. I think the breeding seals on the rookeries come in about the same numbers.—(H. R., 50th Congress, 2nd Session, Report No. 3883, p. 39.)

I made careful examination of the rookeries each year, and after the first year I compared my yearly observations, so that I might arrive at some conclusion as to whether it was possible and expedient to increase our portion of the quota of skins to be taken on St. George Island without injuriously affecting seal life there. I am satisfied, from my observations, that the breeding-grounds on St. George covered greater areas in 1884 than in 1881, and that seal life materially increased between those dates.—(United States Case, Appendix, vol. ii. p. 178.)

Charles Bryant.—As to the date of cows leaving their pups:

The females go into the water to feed when the pups are some six weeks old.—(Senate, 41st Congress, 2nd Session, Ex. Doc. No. 32, p. 5.)

The pup is nursed by its mother from its birth as long as it remains on the islands, the mother leaving the islands at different intervals of time after the pup is *three or four days* old.—(United States Case, Appendix, vol, ii, p. 5.)

As to time spent by pup on land:

When once in the water the young seals soon appear to delight in it, *spending most of their time there in play, tumbling over each other like shoals of fish.*—("Monograph of North American Pinnipeds," p. 387.)

By the 1st September nearly all the pups have learned to swim, and until the time of their departure from the islands spend their time both on land and in the water, but by far *the greater portion of their time is spent on land.*—(United States Case, Appendix, vol. ii, p. 5.)

147 As to slaughter of pups in 1870:

Again, during the season of 1870 the natives, to purchase supplies and for their own food, killed 85,000, mostly 1- and 2-year-old seals.—("Monograph of North American Pinnipeds," p. 398.)

In 1869 about 85,000 seals were taken by the natives. I never stated that any such number were taken in 1870. The full number taken in 1870 was less than 25,000.—(United States Counter-Case, Appendix, p. 414.)

As to relation of fur-seals to the breeding islands:

The fur-seals resort to the Pribyloff Islands during the summer months for the sole purpose of reproduction. Those sharing in these duties necessarily remain on or near the shore until the young are able to take to the water. During this considerable period the old seals are not known to take any food.—("On Eared Seals," p. 95.)

Providing the conditions were the same on the islands the year round as they are in the summer, and providing the food supply was sufficient in the immediate vicinity of the islands, I think the seals would remain on or about the islands during the entire year. The seals evidently consider these islands their home, and only leave them by reason of lack of food and inclement weather.—(United States Case, Appendix, vol. ii, p. 5.)

As to date of fertilization of cows:

At this stage they [the female pups] leave the island for the winter, and very few appear to return to the island until they are 3 years old, at which age they seek the males for sexual intercourse.—("Monograph of North American Pinnipeds," p. 401.)

It is probable that the females of this age (2 years) are fertilized by the bulls, and leave the islands in the fall pregnant.—(United States Case, Appendix, vol. ii, p. 6.)

As to supply of breeding bulls:

A residence of seven successive seasons on the island in charge of these animals has furnished me with the desired opportunity for determining this surplus product by actual study of their habits and requirements, and the result is, the killing of 100,000 per annum does not leave a sufficient number of males to mature for the wants of the increase in the number of females.—(H. R., 44th Congress, 1st Session, Ex. Doc. No. 83, p. 175.)

The stock of breeding bulls has decreased by loss from age and other causes so much faster than there has been young seals grown to replace them, that its present condition is only equal to the present demand, and the stock of half-bulls, or those to mature in the next two years, is not sufficient to meet the wants of the increase in the females. Under these circumstances I feel it my duty to recommend that for the next two years the number of seals to be taken for their skins be limited to 85,000 per annum.—(H. R., 44th Congress, 1st Session, Ex. Doc. No, 83, p. 178.)

The whole time I was there there was an ample supply of full-grown vigorous males sufficient for serving all the females on the islands, and every year a surplus of vigorous bulls could always be found about the rookeries awaiting an opportunity to usurp the place of some old or wounded bull unable longer to maintain his place on the breeding-grounds.—(United States Case, Appendix, vol. ii, p. 7.)

Besides the above, there are a considerable number of United States officials who having occupied posts affording special opportunities for studying seal life, have from time to time frequently reported and written on the subject to their Governments, but neither their testimony nor previous Reports are in any way referred to in the United States Case. Of these, Mr. H. W. Elliott, Mr. Washburn Maynard, Mr. W. J. McIntyre, and Mr. George R. Tingle are the more important.

Mr. H. W. Elliott.

The absence of all reference to the writings or opinions of Mr. H. W. Elliott forms a particularly noticeable omission.

From a date not long subsequent to the acquisition of Alaska by the United States, Mr. Elliott has been known as the principal exponent and official and unofficial writer on the subject of the Pribyloff Islands and the seals resorting to them.

Who Mr. Elliott is, is best told in the words of his testimony given before the Congressional Committee:

44th Cong., 1st Sess., H. R. 623, p. 76.

A. My experience covers three seasons on the Seal Islands. In the winter of 1872–73 a Bill was pending before Congress, framed by Mr. Boutwell, providing for the establishment of four Treasury Agents on the Seal Islands. Professor Baird, of the Smithsonian Institute,
148 was very desirous that some one should be sent from the Smithsonian to study the life and habits of the seals. He saw Mr. Boutwell, and obtained from him permission to nominate a man whom he should appoint as one of the Assistant Agents. Professor Baird selected me. I received the appointment from Mr. Boutwell, and landed on the Island of St. George, 28th April, 1872. I went up there with the special charge of studying the life and habits of the seals. The question was an exceedingly interesting one, about which scientific men had no special data, and therefore Professor Baird's interest in it. I immediately went to work on the grounds from the date of my landing, and I soon found that the subject was one which could not be settled, as I thought it could, satisfactorily to myself, in one season. I accordingly remained over, and spent the season of 1873 on the sealing-grounds on the Island of St. George in order to compare my observations of that season with those of the season previous. I at once saw that whatever I stated in regard to this matter would be subject to criticism, and I thought it necessary to be very thorough in my examination of the subject before I made a report upon it. . . . In the winter of 1873 I expressed to Mr. Richardson and my friends here a great desire to go to the coast of Asia to visit the Russian Seal Islands in order to complete and extend my work begun on our own islands. Mr. Richardson said that he had no authority to send me; that I could go only by authority of Congress. Accordingly I drew up a Bill authorizing the Secretary of the Treasury to gather authentic information on that subject, and it was introduced by my friends, was referred to this Committee, before which I appeared (Mr. Dawes being the Chairman at the time), and referred also to the Committee on Commerce, before which also I appeared, was reported favourably to the House, and approved on the 22nd April, 1874. I immediately received my commission, and set out in May with an associate, provided for by an amendment in the Bill, the Secretary of the Treasury putting the revenue-cutter "Reliance" at our joint disposal. We, in visiting other places, paid special attention to the Seal Islands again this year. I especially wanted to visit them at the height of the breeding season. We were there twenty-eight days, until, Lieutenant Maynard having expressed himself thoroughly satisfied with his investigation on the subject, we set sail for St. Matthew's Island, and, after exploring that and St. Lawrence Island, we returned by way of Ounalaska to San Francisco, and submitted our Reports to Secretary Bristow. A few days after mine was submitted, Lieutenant Maynard submitted his Report, the contents of which I knew nothing of until lately, when it was sent to Congress, in obedience to an order of the House. . . .

51st Cong., 2nd Sess., H. R. 7903.

It should be added that as late as 1890 this gentleman again visited and investigated the breeding resorts on the Pribyloff Islands as the trusted Agent of the United States, and again under the mandate of a special Act of Congress, but that the Report known to have been made on the results of that examination has not been published or produced to Great Britain, although the British Agent made a special demand for its production, and is not anywhere found among the documents cited in or appended to the Case of the United States.

The following is a list of some of Mr. Elliott's Reports and writings on the subject of seal life:

1. Report on the Pribyloff group or Seal Islands of Alaska.—(Washington Government Printing Office, 1873.)
2. Report to Secretary of the Treasury concerning the waste of seal oil, and the "natives" of the Pribyloff Islands, and the brewing of quass.—(H. R., 44th Congress, 1st Session, Ex. Doc. No. 83, pp. 103 and 104.)
3. Report upon the condition of affairs in the Territory of Alaska.—(Washington Government Printing Office, 1875.)
4. "Ten years' acquaintance with Alaska, 1867-77."—(New York. Harpers Brothers, 1877; vol. iv, No. 330.)
5. "The Seal Islands of Alaska."—(Washington Government Printing Office, 1881.)
6. Report on the Seal Islands of Alaska.—(Washington Government Printing Office, 1884.)
7. "Our Arctic Province."

It is to be noted that five out of the above seven publications were printed and circulated by the United States Government, and that besides the above works Mr. Elliott has contributed to newspapers and magazines many articles and papers too numerous to give a list of.

Mr. Elliott has, without doubt, always been considered the leading authority on the fur-seal question.

While it is conceivable that some of the Reports of Agents appointed by the United States to control the Pribyloff Islands may, for many reasons, have been considered by the advisers of the United States as undesirable subjects for publication, it is difficult to understand on what grounds all of the Reports have been ignored, and particularly why the principal official investigator of the natural history of the fur-seal should not be even referred to, and his Report, made in pursuance to a special Act of Congress, should be suppressed.

Mr. A.W. Lavender.

Another noteworthy circumstance connected with the evidence put forward by the United States is as to the declarations which purport to have been made before one "A.W. Lavender." These are very numerous, some being 149 taken at Sitka, others at Washington, others at Kadiak, Nicholas Bay, Dixon Entrance, Victoria, San Francisco, and Lynn Canal.

United States Case, Appendix, vol. ii, pp. 241, 247. Ibid, p. 332. Ibid, pp. 406, 414.

On reference to the declarations it will be found that this gentleman purports to have attested declarations at these various places all on the same day. Thus, on the 14th April he attests the declaration of three Indians in or near Lynn Canal or Chatham Sound, and also the evidence of J. Johnson at Victoria, British Columbia; while on the very same date he purports to attest the declaration of Martin Benson and James Griffin at San Francisco.

Other examples may be found, as to the 26th April, at pp. 257, 357, and 366; as to the 30th April at pp. 256 and 485; as to the 3rd May at pp. 323, 349, 368, and 445; and as to the 12th May at pp. 269 and 283 of the same Appendix.

Mr. Joseph Murray.

Mr. Joseph Murray, another United States Agent, appears to have been able to attest affidavits in two places at once. For instance, on the 13th April he attested the declaration of Isaac Leonard at Kadiak, and on the same day the declaration of E. W. Littlejohn at San Francisco, the distance between the two places being not less than 1,680 miles by sea. (See pp. 217 and 457, United States Appendix, vol. ii.)

The Makah Indians.

No less than twenty-three affidavits from various Makah Indians who inhabit Neah Bay and district appear in the United States Appendix. None of these witnesses have been seen on behalf of Great Britain, nor has their evidence been subject to the test of local inquiry, for the reasons stated in the declaration of Arthur Belyea (see British Counter-Case, Appendix, vol. ii, p. 176), from which it will be seen that in November 1892 he visited Neah Bay, with a view to making the necessary inquiries, but although the Indians were perfectly willing to talk to him and give evidence to him, the United States Government Agent, one John P. McGlinn (who it will be noticed has witnessed nearly every single deposition taken amongst these people), refused to allow him to examine any of the witnesses, although he offered to do so in the presence of the said John P. McGlinn.

Mr. Belyea, however, saw the natives, and tried to get them to give evidence in spite of Mr. McGlinn, but he was told by them that they dare not disobey this Agent, and that he had forbidden them to talk about seals to any stranger who came there without his permission. Whilst he was making these inquiries he was followed by a policeman under the orders of McGlinn, and, as he believed, for the purpose of preventing the Indians from talking to him.

The policeman actually followed him into the house of one of the Indians, and used threatening language to the Indian, which caused him to cease speaking to Mr. Belyea. He, however, got hold of one Indian named Jackson, who made a statement to him, which appears in the British Counter-Case, Appendix, vol. ii, p. 178. The witness, amongst other things, told him that Mr. McGlinn would issue an order that would send any one to gaol who gave evidence to Mr. Belyea.

Mr. Charles Behlow.

The United States evidence comprises some eight declarations by one Charles J. Behlow as to accurate examinations purporting to be made by him of certain cargoes of seal-skins taken from pelagic sealers.

In these depositions he professes to give the result of the examinations, reporting in each case an extremely small number of male skins, and also reporting that the female skins showed that almost all of them were in pup when taken. Inquiries lead to the discovery, however, that Mr. Behlow's inspection of the cargoes in question was so slight as practically to amount to no inspection at

all. One example will suffice to show Mr. Behlow's method. In the case of the "Emma Louise," Mr. Behlow reports (United States Case, Appendix, vol. ii, p. 402) that he examined 1,342 skins from this ship, and he purports to give an accurate result of his investigation, showing 4 bulls, 123 males, 98 pups, and 1,112 cows. It will be seen from the affidavits of Charles B. J. Barber, Charles D. Ladd, and J. A. Belodo (British Counter-Case, vol. ii, p. 173 *et seq.*) that the examination of this large number of skins, which in ordinary course would take a great many hours to examine, did not occupy Mr. Behlow more than five minutes, and that he stated to them that it did not pay to inspect them, as he was only paid 5 dollars a-day for doing it.

The skins were subsequently forwarded to London—to Messrs. Lampson—and their Report on them will be found on p. 112, vol. ii, British Counter-Case, Appendix. This Report shows that no less than 563 skins were too light to be those of bearing females, and 306 of them are too heavy to be females at all, leaving a balance only of 469 which could have been bearing females.

United States Tables.

The various statistical Tables used throughout the United States Case and Counter-Case contain many regrettable errors, which will at the proper time be pointed out. It is sufficient here, as an example of these errors, to draw attention to the now admitted serious inaccuracies in Messrs. Lampson's Tables (United States Case, Appendix, vol. ii, p. 582), and to the extraordinary Tables appearing at p. 369 of the United States Counter-Case Appendix. This latter Table has been examined by an actuary, with the result that he reports that every single calculation of averages shown thereon is erroneous. This Table is particularly relied upon in the United States Counter-Case (p. 77), on the question of the average weight of seal-skins in various years.

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See British Counter-Case, Appendix, vol. ii, p. 263.

Contradictory declarations.

In a great number of cases deponents giving evidence for the United States have been seen with reference to their affidavits, and almost invariably it has been found that the statements made in the original deposition were capable of considerable modification and explanation not contained in the original affidavit. Fresh affidavits have been obtained from some of these deponents. In many cases the witnesses directly contradict their former statements, and others even deny that they made them. The following few examples will show with what caution the evidence put forward by the United States should be received:

Statements in Depositions taken on behalf of the United States.	*Statements of same Witnesses in Depositions taken on behalf of Great Britain.*
Thorwal Mathason.—As to number of females in coast catch:	
We caught over 1,000 seals off the coast; most all females, and a great number of them had young pups in them.—(United States Case, Appendix, vol. ii, p. 339.)	I told him [the United States Agent] about three out of five were females.—(British Counter-Case, Appendix, vol. ii, p. 167.)
As to number of seals lost:	
It takes anywhere from one to twenty shots on the average to secure a seal, and I think we got about three out of five that we killed.—(United States Case, Appendix, vol. ii, p. 339.)	He [the United States Agent] did not ask me how many seals were lost by sinking, but if he had I would have told him very few were lost. Last year, out of 243 seals taken by the boat I was in, 5 were lost by sinking; this, 142 were taken, and 3 were lost by sinking. This is about the usual percentage lost. . . . The first shot kills the sleeping seal if the hunter is any good.—(British Counter-Case, Appendix, vol. ii, p. 167.)
Henry Brown:	
A long deposition on sealing matters purporting to be made by this witness appears in the United States Case, Appendix, vol. ii, p. 317, in which he states he was employed on the schooner "Minnie," 1890, the "Mascotte," 1891, and the "May Belle," 1892.	In 1890 I was a seaman on the "Minnie." In 1891 a seaman on the "Mascotte." In 1892 I was a seaman on the "May Belle" until the 18th April. I have never given any statement to any person on sealing matters either at Victoria or any other place. I am positive that I was not in Victoria in the month of April last, and did not then or at any other time or place make any statement to any person about sealing.—(British Counter-Case, Appendix, vol. ii, p. 171.)
Alfred Dardeau.—As to proportion of females:	
Of the seals that were caught off the coast, fully 90 out of every 100 had young pups in them. . . . [In Behring Sea] most all of them were females that had given birth to their young on the islands.—(United States Case, Appendix, vol. ii, p. 322.)	I consider half the seals caught by the schooner "E. B. Marvin" [the only sealing-vessel he was ever on] during the time I was aboard of her were females, and a large proportion of these female seals were barren.—(British Counter-Case, Appendix, vol. ii, p. 181.)
William Short.—As to proportion of females:	
When cruizing along the coast our principal catch was female seals in pup. . . . Fully 90 per cent. of seals obtained by us in Behring Sea were cows in milk.—(United States Case, Appendix, vol. ii, p. 348.)	I told him that in some places we got most males, and in others most females.—(British Counter-Case, Appendix, vol. ii, p. 182.)
151 **George Dishow.—As to number of females:**	
A large proportion of all the seals taken are females in pup.—(United States Case, Appendix, vol. ii, p. 323.)	Sometimes I got more males than females, and sometimes more females than males. Taking the years together, I think the catch was about half and half.—(British Counter-Case, Appendix, vol. ii, p. 57.)

As to nursing cows in Behring Sea:

Most of the seals taken in Behring Sea are females. Have taken them 70 miles from the islands, that were full of milk.—(United States Case, Appendix, vol. ii, p. 323.)

A few cows there [in Behring Sea] would be in milk.—(British Counter-Case, Appendix, vol. ii, p. 57.)

As to close season:

I think a closed season should be established for breeding seals from the 1st January to the 15th August, in the North Pacific Ocean and Behring Sea.—(United States Case, Appendix, vol. ii, p. 323.)

I told him [United States Agent] I thought the Sea ought to be closed till about end of July, and then let us go in.—(British Counter-Case, vol. ii, p. 57.)

Niels Bonde.—As to proportion of females:

The seals caught along the coast after the 1st April are mostly pregnant females, and those caught in Behring Sea were females that had given birth to their young.—(United States Case, Appendix, vol. ii, p. 316.)

I would say that about 60 per cent. on the coast were females, and about 50 per cent. females in Behring Sea.—(British Counter-Case, Appendix, vol. ii, p. 94.)

As to number of seals lost:

A green hunter will not get more than one out of five; and I have known one hunter on our vessel who shot eighty shots and got only four seals.—(United States Case, Appendix, vol. ii, p. 316.)

The poor hunter missed half of those he fired at; he wounded a few, which escaped; he sunk a few.—(British Counter-Case, Appendix, vol. ii, p. 94.)

John Morris.—As to scarcity of seals:

Seals are scarcer now than in former years. . . . The seal herd will soon become exterminated.—(United States Case, Appendix, vol. ii, p. 340.)

Each year I have found the seals on the coast about in the same numbers; . . . . taking it one year with another they don't change much, if at all.—(British Counter-Case, Appendix, vol. ii, p. 170.)

As to the proportion of females:

We began sealing off Cape Flattery, ... and captured about 800 seals along the coast. There were not over 10 males in the whole lot. . . . About the last of April 1883 I sailed from Victoria, on a sealing voyage, on the "Onward," Morris, master, ... and captured about 400 seals while I was on her. They were all females with pup, excepting the yearlings, which were about one-half male and one-half female. In February 1885 I sailed from Victoria, British Columbia, in the schooner "76," Potts, master, ... and caught about 20 seals, all of which were pregnant females.—(United States Case, Appendix, vol. ii, p. 240.)

There is no getting out of the fact that there are more males taken than females. If any one says that I ever told him that more females were taken than males he says what is not true.—(British Counter-Case, Appendix, vol. ii, p. 170.)

James Robert Jamieson.—As to number of seals lost:

The ordinary white hunter will, on an average, lose over half that he kills and wounds.—(United States Case, Appendix, vol. ii. p. 331.)

I think the average hunter would miss one-third the seals shot at. . . . Not over one seal in twenty escapes after being shot by the hunter.—(British Counter-Case, Appendix, vol. ii, p. 180.)

152 As to proportion of females and pregnancy:

In hunting along the coast, I think about 80 per cent. of those we caught were females, and most of them were carrying their young.—(United States Case, Appendix, vol. ii, p. 330.)

Not over one in forty of the female caught on the coast *en route* to Behring Sea were with pup inside.—(British Counter-Case, Appendix, vol. ii, p. 180.)

Herbert Shelley Bevington.—As to prohibition of pelagic sealing:

The deponent further said that . . . the continual supply of fur-seal skin, which it is important should be constant and regular in supply, is absolutely necessary to the maintenance of this industry. . . . . .

He has no hesitation in saying that the best way to accomplish that object would be to prohibit absolutely the killing of all seals except upon the islands, and furthermore to limit the killing of seals in the islands to the male species at particular times, and to limit the number of the males to be so killed. If, however, the rights of individuals are to be considered, and sealing in the open sea is to be allowed, then deponent thinks that the number of vessels to be sent out by each country ought to be limited, and the number of seals which may be caught by each vessel should be specified.—(United States Case, Appendix, vol. ii, p. 553.)

I am not in favour of its [North-west catch] total suppression.

I am of opinion that the North-west catch is a useful element in the market, and I think the trade would object to its disappearance. Its total suppression, in my opinion, would tend to create a monopoly, and would place the whole business in the hands of the persons for the time being owning the islands, and this I should object to.—(British Counter-Case, Appendix, vol. ii, p. 249.)

Herbert Shelley Bevington.—As to intermingling:

That the differences between the three several sorts of skins last mentioned [Alaska, Copper, and North-west] are so marked as to enable any person skilled in the business, or accustomed to handle the same, to readily distinguish the skins of one catch from those of another, especially in bulk, and it is a fact that when they reach the market the skins of each class come separately and are not found mingled with those belonging to the other classes.—(United States Case, Appendix, vol. ii, p. 551.)

In my opinion, at least 25 per cent. of the skins found amongst Copper Island skins are undistinguishable from Alaskas, and in the same way at least 25 per cent. of the skins found amongst Alaskas are undistinguishable from Coppers. In both consignments I have noticed also a considerable quantity of skins which in a less marked manner resembled the other class, but I consider the bulk can be distinguished.—(British Counter-Case, Appendix, vol. ii, p. 249.)

Léon Révillon, member of the firm of Révillon Frères, of Paris.—As to prohibition of pelagic sealing:

We firmly believe that if the slaughter of the North-west coast fur-seals is not stopped *or regulated*, the Alaska fur-seals will disappear entirely.

[The marginal note to this paragraph is: "If pelagic sealing is not stopped, Alaska fur-seals will disappear."]—(United States Case, Appendix, vol. ii, p. 590.)

5. Q. The next point, M. Révillon, is as to the last paragraph of your deposition, of which the marginal note reads: "If pelagic sealing is not stopped, Alaska fur-seals will disappear." Does that marginal note fairly represent what you meant to convey?—A. No; I do not think it does. I did not intend to convey that I was in favour of any particular way of regulating the question. All that I meant was that if what I heard was true, I thought some sort of Regulation was necessary for the protection of the seals.

6. Q. Would not the total suppression of all pelagic sealing have the effect of giving the Company leasing the islands an absolute monopoly of the business in this class of seals?—A. This might be so; I do not know.

7. Q. Well, assuming that it would be so, do you think it would be a result that would be beneficial to the fur-seal business?—A. It depends upon how the monopoly is managed, but, speaking generally, I am against monopolies, and in favour of a free market. I think monopolies injure the progress of business.—(British Counter-Case, Appendix, vol. ii, p. 230.)

H. Poland.—As to intermingling:

That the three classes of skins above mentioned [Alaska, Copper, and North-west] are easily distinguishable
153 from each other by any person skilled in the business or accustomed to handling skins in the raw state.

That the deponent has personally handled samples of the skins dealt in by this firm, and would himself have no difficulty in distinguishing the skin of the Copper Island catch from the skin of the Alaska and North-west catch.—(United States Case, Appendix, vol. ii, p. 571.)

I admit that amongst the Copper Island catch there is a certain percentage of skins which are for the most part undistinguishable from the Alaska (or Pribyloff Island) catch, although that percentage would be difficult to ascertain. At a guess I should say that it was not more than 30 per cent., but of course the fur of some of these would be less dense. I have also noticed in the Alaska catch that there are in some particular years skins which are undistinguishable from Copper Island skins.—(British Counter-Case, Appendix, vol. ii, p. 250.)

William Charles Blatspiel Stamp.—As to intermingling:

That skins of these several catches [Alaska, Copper, and North-west] are readily distinguished from each other.

. . . .

The differences between Copper and Alaska seals are difficult to describe so that they can be understood by any person who has no practical knowledge of furs, but to any one skilled in the business there are apparent differences in colour between the Copper and Alaska skins, and a difference in the length and quality of the hairs which compose the fur, and there are also apparent slight differences in the shape of the skin. The difference between the skins of the three catches are so marked, that they have always been expressed in the different prices obtained for the skins.—(United States Case, Appendix, vol. ii, p. 575.)

In my opinion, there is no absolute line of demarcation between the Copper Island skins and Alaskas, and in inspecting the consignments made each year from the Pribyloff Islands, through Messrs. Lampson and Co., I have found a certain percentage of skins which were *facsimiles* of Copper Island skins, and in the same way, inspecting consignments of Copper Island skins, I have seen skins which had I seen them elsewhere, I should have classed as Alaskas, and also a certain number of the intermediate degrees of similarity.—(British Counter-Case, Appendix, vol. ii, p. 245.)

William Charles Blatspiel Stamp.—As to prohibition of pelagic sealing:

That the continued existence of the fur-seal business is dependent, in deponent's judgment, upon the preservation of the seal herds frequenting the North Pacific region, and is also a most important element in the industry, that the supply of seal-skins coming into the market each year should be regular and constant.

* * * *

That some Regulations are necessary for the preservation of the seal herds frequenting the Northern Pacific region.—(United States Case, Appendix, vol. ii, p. 574.)

I am not in favour of the suppression of the North-west catch. In my opinion it would be neither just nor practicable. It would not be just, because I consider that the Canadians have a right to catch the seals frequenting the sea adjoining their own shores, and which feed to a large extent on the food there found, provided they do so in a proper manner.

I think it would be impracticable, because the only effect of entire prohibition would probably be to cause the Canadian schooners to register under the flags of other nations. I am of opinion also that the North-west catch is a very important element in the market in keeping the price of the articles within the reach of the ordinary consumer.—(British Counter-Case, Appendix, vol. ii, p. 245.)

Emile Hertz, member of the firm of Emile Hertz and Co., Paris.—As to intermingling:

That the said firm can distinguish very readily the source of production of the skins when the latter are in their undressed state.—(United States Appendix, vol. ii, p. 588.)

I have from time to time seen among the consignments of Alaska seals offered for public sale by Messrs. Lampson and Co., of London, skins resembling Copper Island skins, and among the consignments of this latter sort skins resembling the Alaska kind, but I believe it to be impossible to affirm absolutely that these doubtful skins belong to one or other of these two localities.—(British Counter-Case, Appendix, vol. ii, p. 242.)

Norman Hodgson.—As to sorting male from female skins:

I have handled a great many seal-skins, and can, upon examination of the pelt, distinguish the sex of the animal, except in the case of animals under 2 years of age; these cannot always be distinguished. I examined carefully this day 420 seal-skins on board the British sealing-schooner "Henrietta," which skins, according to log and sealing-book of 154 said vessel, were taken in Bering Sea during the month of August 1892, and find, to the best of my knowledge and belief, the proportion of the sexes to be as follows:—Females, 361; males, 33; young, the sex of which could not be distinguished, 26.

(Signed) N. HODGSON.

Subscribed and sworn to before me at Sitka, Alaska, this 21st day of September, 1892.

(Signed) C. L. HOOPER,
Notary Public, District of Alaska.

—(United States Counter-Case, p. 369.)

At Unalaska I was placed on board the seized vessel "Henrietta" with Lieutenant Johnson, of the "Corwin," to proceed with her to Sitka. She had at the time of seizure about 400 skins, and on our arrival at Sitka I was asked to inspect these to determine the sex of the seals from which they had been taken. Captain C. H. Hooper, of the "Corwin," asked me to do this. I told him it was impossible to ascertain this with any degree of accuracy, but he said to go on anyway and do my best, and I did so. I gave him a statement of what I thought they were; he wished me to swear to it, but I told him I could not do so, but the statement I had given him was to the best of my knowledge. After the skins are salted, I consider it impossible to define the sex of the smaller skins up to 3 years. With the old cows and old bulls, of course, an expert can tell, but I consider it quite impossible for *any one* to say, after skins have been salted, that any particular skin was that of one that had been carrying young and from which the pup had been cut.—(British Counter-Case, Appendix, vol. ii, p. 134.)

As to seals sinking:

The white hunter secures on an average about 60 or 65 per cent. of all fur-seals shot in the season.—(United States Case, Appendix ii, p. 367.)

Lose very few seals by sinking; from 5 to 10 per cent. will cover my total loss in that respect.—(British Counter-Case, Appendix, vol. ii, p. 134.)

Charles Campbell:

Experienced hunters lose very few seals that are shot, but beginners lose a great number.—(United States Case, Appendix, vol. ii, p. 256.)

Majority of seals taken are females, with young.—(United States Case, Appendix, vol. ii, p. 256.)

I am no hunter, but this year I killed 15 seals, and lost 1 only.—(British Counter-Case, Appendix, vol. ii, p. 77.)

The principal part of my catch was young males; there were more of them than females.—(British Counter-Case, Appendix, vol. ii, p. 77.)

Clat-ka-koi.—As to hunting on coast:

He does not hunt seal in schooners.

This season this village got 86 seals, and four canoes were manned from this village.

I have hunted both from shore and from schooner.

I told him [United States Agent] that this year our tribe had got 750 seals with nineteen canoes fishing from the shore, and that we had got more last year. I told him that one canoe owned by a man named Kennedy, of the same tribe as I am, had got 86 seals from the shore [in 1891] last year.

Sometimes a few seals follow schools of herring into [Barclay] Sound and go out hurriedly. On such occasions a few are killed.—(United States Case, p. 35.)

I told him [United States Agent] I had seen seals inside of Barclay Sound, and had killed them as far up as "Turn Point," and even farther up the canal. I told him that when the bait would come in sometimes I would go out and get three seals in a little while, and have gone a mile and a-half outside of Village Island, when the herring have been plenty, and seen lots, and that I have seen a canoe get from 15 to 20 a day there. . . . . Seals come into Barclay Sound every year, sometimes more than others; the more fish that come in the more seals come.—(British Counter-Case, Appendix, vol. ii, p. 150.)

Other questions referring to numbers of seals lost by sinking, composition of catch, &c., were asked Clat-ka-koi by the United States Agent, but his replies do not appear in the United States Case.—(See British Counter-Case.)

"Dick," or Ehenchesut.—As to hunting on coast:

To his knowledge, no seals ever came inside Barclay Sound, and that he never caught any inside, and, moreover, he and his friends never heard of any entering these waters.

155 He states that during the last five months twenty-five canoes belonging to the village, manned by fifty men, have been engaged in sealing off the coast of Vancouver Island. They obtained in this time 10 skins *per capita*, in all, 500 skins. . . . . The fifty men who went out from this village joined schooners, two in number, and the seals were caught about 20 miles to southward and westward of Cape Flattery. Of the number caught, 360 were caught and killed by the natives of this village.—(United States Case, pp. 306, 307.)

I told him [United States Agent] we got skins, every season inside of Village Island, in Barclay Sound; I could not have told him anything else, for I told him I had got them as far up as Ecool.

I told him [United States Agent] that our tribe and the Opichissets manned thirty canoes to hunt seals from the shore this last season. He never asked me how many skins the whole tribe had got, but how many one canoe would get from the shore in a season, and I told him 30. He then asked how many one canoe would get from a schooner in a season, and I said about 40 hunting off the coast in a schooner. . . . . I did not tell him I have been hunting off Cape Flattery this year, for I have not been sealing there for three years or more.—(British Counter-Case, Appendix, vol. ii, p. 155.)

Ehenchesut further testifies as to no decrease in the number of seals, composition of catch, &c., and that questions were asked him on these points by the United States Agents, but no reference to them appears in the United States Case. He is stated in the United States Case to be a Chief, but testifies that he never was one, and never said he was. He was paid 5 dollars for his evidence by the United States Agent, and each of the men with him 1 dollar.

Imihap.—As to hunting on coast:

Certifies as to evidence given by Ehenchesut to United States being true.—(United States Case, p. 308.)

Certifies to evidence given by Ehenchesut to Great Britain being true.—(British Counter-Case, Appendix, vol. ii, p. 156.)

Chileta.—As to hunting on coast.

Certifies as to evidence given by Ehenchesut being true. (United States Case, p. 308.)

[See testimony of Ehenchesut above.]

Told the United States Agent that in a season a canoe would get about 100 seals. He told him that about 300 seals had been taken by sealing off shore. "I never told the old man that seals did not come in to Barclay Sound, for we kill them every year away up, as far as Bird Rocks." British Counter-Case, Appendix, vol. ii, p. 145.

John Margathe (Margotich).—As to seals in Barclay Sound:

States that fur-seals are rarely seen in Barclay Sound, and are usually found off the coast at a distance of from 5 to 15 miles. They are found in clear water, and never close to the land.

I told him [United States Agent] that the seals came in every year amongst the islands, and were also found off the coast every year. I said young pups were caught about the Sound and coast every year; some years more and some years less. . . . . I could not have told the captain that seals never came into the Sound, for I have been twenty-five years on this coast, and have always seen the seals come into the Sound every year.

He is also agent for five sealing-vessels owned in Victoria.—(United States Case, pp. 308, 309.)

Never said I was agent for five sealing-vessels, because I am not agent for any.—(British Counter-Case, Appendix, vol. ii, p. 154.)

Wackenunesch.—As to seals in Barclay Sound:

States that seals do not come in close to shore in this locality [Barclay Sound]. Seals are caught off the coast at from 5 to 20 miles. Formerly Indians hunted them for food, but nowadays white men and Indians hunt them for their fur, and they are rapidly diminishing in number. Last year there were fewer than ever before. This year the natives caught about one-half as many as last. In his opinion the seals will soon be exterminated, and in three years there will be no more sealing.—(United States Case, p. 311.)

I was asked [by United States Agent] many questions, and said there were not many seals in the Sound and along the coast this year, but last year (1891) there were plenty. Said the reason was that this year white men had come in and hunted them away with guns and made them wild. . . . . *He* told me that the Indians formerly hunted the seals for their food, but now they hunted them for their skins. White man asked me how long I thought it would be before there would be no skins, and I said that would be impossible; there would always be lots of skins, but they would be harder to get, because the seals were wilder.—(British Counter-Case, Appendix, vol. ii, p. 158.)

156 Charlie Hayuks.—As to hunting on coast:

Certifies to truth of what Wackenunesch said.—(United States Case, p. 312.)

A year ago last spring . . . . we took over 1,000 seals at Barclay Sound from the shore. None of us Indians think the seals are any fewer.—(British Counter-Case, Appendix, vol. ii, p. 146.)

William Bendt.—As to decrease, protection, &c.:

In Appendix to United States Case, vol. ii, pp. 404, 405, testifies as to decrease in number of seals, protection necessary, &c.

Have never been out seal-hunting myself, and personally know nothing whatever about the loss through sinkage of seals that are shot, nor have I any knowledge personally as to whether the seals are decreasing or where they are caught.—(British Counter-Case, vol. ii, p. 186.)

William Hermann.—As to loss hunting:

One seal secured to two lost.—(United States Case, Appendix, vol. ii, p. 445.)

I would not lose more than 5 seals in 100 that I would hit.—(British Counter-Case, Appendix, vol. ii, p. 118.)

G. Miner.—As to loss hunting:

33 per cent. of the seals shot with the shot-gun are lost.—(United States Case, Appendix, vol. ii, p. 466.)

He asked me the average number of seals destroyed. I replied, "Not more than 10 per cent." In this I included those that I know were killed and would sink, and those that were badly wounded and I thought would die afterwards.

The actual number I see sink is much smaller than that. Last year not more than one of nine sank. This year I got 384 skins, and 10 seals sank and were lost.—(British Counter-Case, Appendix, vol. ii, p. 97.)

As to proportion of females:

A large majority of the seals killed in the North Pacific are cows with pups, and in Behring Sea cows with milk.—(United States Case, Appendix, vol. ii, p. 466.)

There is a majority of females as a rule, both on the coast and in Behring Sea, but this year our catch did not contain more than 10 per cent. of females, I think. I took about 10 per cent. of females.—(British Counter-Case, Appendix, vol. ii, p. 97.)

Charles Lutjens.—As to loss hunting:

We get 80 per cent. of those we shoot.—(United States Appendix, vol. ii, p. 458.)

In my opinion, 5 per cent. will cover the lost seals by sinking after being shot. . . . . Of course a poor hunter will not do so well.—British Counter-Case, Appendix, vol. ii, p. 122.)

Frank Moreau.—As to loss hunting:

We lose about 25 per cent. of those we shoot.—(United States Case, Appendix, vol. ii, p. 467.)

The loss from sinkage through being killed or mortally wounded would not be greater than 8 per cent., which would cover the whole loss.—(British Counter-Case, Appendix, vol. ii, p. 135.)

As to proportion of females:

90 per cent. of skins taken were cows, and 75 per cent. of cows taken were with pup.—(United States Case, Appendix, vol. ii, p. 467.)

States that 80 per cent. are females, of which 75 per cent. are in pup, and in Behring Sea about the same percentage in milk.—(British Counter-Case, Appendix, vol. ii, p. 135.)

James Carthcut.—As to loss hunting:

I think on the average I got one out of every three killed, but some of my hunters did not do as well.—(United States Case, Appendix, vol. ii, p. 409.)

I never was out in a boat with a seal-hunter, but have seen hunters killing near the vessel, and know that hunters do not lose many by sinking and a really good hunter loses very few, not over 5 in 100.—(British Counter-Case, Appendix, vol. ii, p. 138.)

157 As to decrease of seals:

Seals were not nearly so numerous in 1887 as they were in 1877. . . . I do not think it possible for seals to exist for any length of time if the present slaughter continues.—(United States Case, Appendix, vol. ii, p. 409.)

Always sealed along the coast and in Behring Sea, and noticed no difference in the number of seals from the first to the last year.—(British Counter-Case, Appendix, vol. ii, p. 138.)

States that he first went sealing in 1883.—(British Counter-Case, Appendix, vol. ii, p. 138.)

As to proportion of females:

85 per cent. of my catch of seals along the coast of the North Pacific Ocean were females.—(United States Case, Appendix, vol. ii, p. 409.)

About 60 per cent. I think would be about the average run of females, and it would run about the same in Behring Sea.—(British Counter-Case, Appendix, vol. ii, p. 139.)

It is unnecessary to give any further examples, although if this should be required the above could be easily multiplied.

Sufficient examples have been given to show the unreliable character of a great proportion of the evidence produced by the United States, and with what caution it ought to be received.

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